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Contents

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Edited by the Undergraduates of Baruch College

TABLE OF CONTENTS

Vol. 1 Spring 2025 No. 1

MASTHEAD

BARUCH UNDERGRADUATE LAW REVIEW

Vol. 1 Spring 2025 No. 1

MISSION

Vol. 1 Spring 2025 No. 1

The Baruch Undergraduate Law Review is dedicated to cultivating excellence in legal writing and research among pre-law students at Baruch College.

Our primary mission is to equip aspiring legal professionals with the skills necessary to produce insightful, well-researched legal analyses and writings. We aim to create an environment where students can explore and contribute to discussions on various legal topics and contemporary issues through a scholarly research lens.

Recognizing the importance of effective communication in the legal field, our organization emphasizes training and mentorship in legal writing. We provide writing workshops, peer-review editing sessions, and guidance from legal professionals to help our members develop the ability to articulate complex legal arguments clearly and persuasively.

Through our publication, we offer a platform for students to showcase their legal scholarship, fostering an environment of intellectual curiosity and rigorous academic inquiry. The Baruch Undergraduate Law Review not only serves as a stepping stone and preparation for future legal careers, but also as an essential resource for developing the analytical and writing competencies that are crucial in the legal profession.

ACKNOWLEDGEMENTS

Vol. 1 Spring 2025 No. 1

The Baruch Undergraduate Law Review extends its deepest gratitude to the individuals and teams who made this semester's publication possible.

First and foremost, we thank our Baruch Faculty, whose guidance and mentorship have been instrumental in shaping the academic and professional rigor of our publication. Your unwavering support continues to inspire the next generation of legal scholars at Baruch.

We are especially grateful to our editorial team on both our Print and Online Division, for their tireless commitment to excellence. From reviewing submissions to refining each article, your attention to detail and dedication to upholding the highest standards in legal writing reflect the core mission of the Law Review.

To our staff writers, thank you for your thoughtful research, analytical depth, and intellectual curiosity. Your work represents the essence of what we strive to cultivate, an environment for scholarly discussion, rigorous legal analysis, and diverse perspectives on today's most pressing legal issues.

We also acknowledge the efforts of our design and social media team, whose creativity and professionalism have brought our publication to life and ensured its reach across campus and beyond.

Lastly, we extend our appreciation to all members, both new and returning, who participated in workshops, peer reviews, and our social events this semester. Your enthusiasm and commitment continue to shape the Baruch Undergraduate Law Review as a space for collaborative learning.

Together, we reaffirm our mission to prepare aspiring legal professionals, enhance research and writing skills, and build a lasting academic community rooted in excellence.

LETTER FROM EDITOR-IN-CHIEF

Dear Readers,

It is with great pride that I present the inaugural issue of the *Baruch Undergraduate Law Review*. This publication reflects the dedication, intellectual curiosity, and hard work our student contributors have poured into every page.

This issue features a diverse range of articles that apply foundational legal principles to today's emerging legal issues. From immigration policy under the current administration and U.S.–China trade relations to the global implications of economic sanctions, each piece reflects the thoughtful engagement of Baruch's pre-law community. Whether you are a student, legal professional, or curious reader, we hope these articles spark reflection and foster meaningful dialogue.

This publication also marks a historic milestone as Baruch's first-ever undergraduate law review. It signals a new chapter in our pre-law community's growth and our commitment to cultivating the next generation of legal thinkers and advocates. By providing a platform for rigorous student analysis, we aim to encourage critical thought and expand our scholarly community.

I would like to extend my deepest thanks to our editors and writers. Their tireless efforts and commitment have been instrumental in bringing this issue to life.

On behalf of the editorial team, thank you for supporting the *Baruch Undergraduate Law Review*. We look forward to growing alongside our readers as we continue to elevate student legal scholarship at Baruch College.

Sincerely,

Jessica Plepi

Editor-in-Chief, Baruch Undergraduate Law Review

Article

Crime Prevention vs. Racial Justice: The Utilitarian Paradox of Stop-and-Frisk in the New York Police Department

Navipa Zaman

Stop-and-frisk, a proactive street patrol method designed to reduce crime in New York City, appeared to be successful as crime rates decreased. However, certain discrepancies in the data began to emerge. Firstly, the number of successful stop-and-frisk occurrences that resulted in an arrest or criminal charges, thereby suggesting potential crime prevention, was staggeringly low. Secondly, a pattern of discrimination began to show in the data when the majority of those stopped were minorities or people of color. This paper examines the role of utilitarian principles in the New York Police Department's (NYPD) use of stop-and-frisk, exploring its historical background through key court cases and determining its effectiveness using real police data. This analysis focuses on the tension between the NYPD's utilitarian ideals—seeking to eliminate all crime regardless of the means—and the significant ethical and constitutional issues that arose as a consequence. Certain justifications are criticized by incorporating perspectives from experts, activists, and researchers, such as differential offending and the Broken Windows theory. The analysis highlights the landmark 2013 case *Floyd v. City of New York*, in which Judge Shira A. Scheindlin ruled that stop-and-frisk violated the Fourth and Fourteenth Amendments and subsequently called for significant reforms and appointed a federal monitor to conduct oversight of the NYPD. However, in 2023, under Mayor Eric Adams' administration, the monitor released reports detailing the increasing racial disparities once again present in stop-and-frisk. Despite this, more effective approaches to balancing public safety and community trust are what should be advocated for.

I. Introduction

In the 1990s, New York City implemented stop-and-frisk policies to combat the rising crime rates. Stop-and-frisk permitted officers to stop individuals and conduct pat-down searches. This approach allowed officers to pursue policing tactics deemed necessary to reduce crime, often without regard for the ethical implications of their actions. Following this utilitarian approach, crime decreased significantly in the city. However, in 2013, under intense scrutiny, Judge Shira A. Scheindlin for the Southern District of New York found the New York Police Department's (NYPD) use of the stop-and-frisk street patrol method in violation of the Fourth Amendment and the Equal Protection Clause of the Fourteenth Amendment in *Floyd v. City of New York*.[1] The Fourth Amendment protects citizens from unreasonable search and seizure by the government, and the Equal Protection Clause requires that all citizens be treated equally under the law. Stop-and-frisk tactics resulted in a disproportionate number of minority citizens being stopped, violating the previously mentioned amendments. Thus, Judge Scheindlin ruled that the city had adopted a policy of indirect racial profiling by targeting specific hotspot neighborhoods based on the city's crime suspect data.[2]

Supporters of stop-and-frisk, like former mayor Michael Bloomberg, opposed Judge Scheindlin's ruling, arguing that since its inception, the stop-and-frisk policy allowed for over 8,000 guns and some 80,000 other weapons to be taken off the streets.[3] However, Bloomberg and those who believe in the importance of stop-and-frisk overlook the absence of a clear correlation between the removal of weapons and stop-and-frisk. Findings from *Floyd* reveal that from January 2004 through June 2012, the NYPD had made around 4.4 million pedestrian stops. The New York Civil Liberties Union (NYCLU) reported that there is no proven research that supports the effectiveness of this practice, noting that only 6% of the 4.4 million stops led to an actual arrest.[4] This undermines Bloomberg's argument, suggesting that while a small percentage of stop-and-frisk situations may have contributed to the overall reduction in crime, the data does not support the conclusion that stop-and-frisk is exclusively responsible for the confiscation of illegal weapons. Furthermore, over 80% of those stopped were of African American or Latino background, highlighting racial disparities.[5] Such stops foster a sense of mistrust between the police and minority communities and further reinforce inherent biases that the parties may possess.

Following this discovery, Judge Scheindlin appointed a federal monitor to oversee department-wide reforms in the NYPD to prevent further racial profiling. It is important to note that Scheindlin did not prohibit stop-and-frisk altogether; rather, she emphasized police reforms to prevent further harm to minorities. Scheindlin proposed a series of training programs, increased documentation of stops, and steady monitoring. These reforms held for around a decade until September 2024, when Mylan L. Denerstein, the appointed monitor, filed a report in federal court indicating that several NYPD units were responsible for over 50% of unlawful

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[1] Floyd v. City of New York, 959 F. Supp. 2d 540 (S.D.N.Y. 2013).
[2] Jessica L. Fangman, Stop the "Stop and Frisk?" How Floyd v. City of New York Will Limit the Power of Law Enforcement Across the Nation, 19 PUB. INT. L. REP. 50 (2013).
[3] *Id.* at 51–52.
[4] David Rudovsky & Lawrence Rosenthal, Debate: The Constitutionality of Stop-and-Frisk in New York City, 162 U. PA. L. REV. Online. 117 (2013).
[5] *Ibid.*

stops reported.[6] This followed the 2022 election of the current mayor, Eric Adams, who is a former police captain who has been critiqued by many for returning to aggressive policing tactics aimed at Black and Latino citizens.[7] It has become increasingly apparent that this regression to intense stop-and-frisk policies will persist, continuing to harm minorities disproportionately. This mindset that the NYPD has adopted, and that Eric Adams continues to promote, seeks to end all crime to whatever extent, making stop-and-frisk a harmful utilitarian policy that will prevent the possibility of a good-faith relationship between the police and the communities they serve.

II. Roadmap

A. Utilitarian Principles in Stop-and-Frisk Policing

Before we can understand the inadequacy of stop-and-frisk, we must first step back and understand the NYPD's utilitarian approach to crime-stopping, leading to a breakdown of trust between the police and the people they swore to serve and protect. Utilitarianism is the fundamental belief that only an action's results or consequences are relevant when determining its moral value. Philosopher Jeremy Bentham was the first to construct a rigorous theory of utilitarianism, advocating that we should always strive to "maximize happiness." [8] Similarly, the NYPD has historically failed to comprehend how a particular policy would net out over a given period and instead focused on seeking an immediate solution to a problem they face. This tunnel vision has eroded public trust in the police, specifically in minority groups, who are frequent targets of stop-and-frisks. By seeking immediate results, the NYPD was unable to recognize how this policy began to harm majority-minority areas due to inherent biases.

To understand utilitarianism, we must analyze Bentham's three major principles that make utilitarian policies so unique:

1) The Consequentialist Principle
2) The Utility Principle
3) The Equality Principle

First, the consequentialist principle is the foundation of utilitarianism, establishing that only the given outcomes of a scenario are of value. In the case of stop-and-frisk, the NYPD prioritizes the potential reduction of crime statistics and not the methods by which they achieved this result. Although the NYPD targeting specific zones based on historical crime statistics doesn't sound that inconceivable, one should take into account that despite using verified hot spot zones, the police have had a negligible yield rate of successful "hits."[9] As mentioned before, only 6% of stops resulted in any legal action. Therefore, using stop-and-frisk to reduce all crime is ineffective, as the probability of a failed outcome is significantly higher than a successful one. Second, the utility principle emphasizes that any rational actor, defined as a person who can rank order their preferences and then use transitivity to choose their top choice, should select the

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[6] Mylan Denerstein, Richard Jerome, Anthony, Braga, Jennifer Eberhardt, Demosthenes Long, John MacDonald, James McCabe, Jane Perlov, James Yates, Twenty-first Report of the Independent Monitor, NST Compliance Report. 3, (2024).

[7] Hurubie Meko & Emma G. Fitzsimmons, Illegal Police Stops Have Risen Under Mayor Adams, Despite Court Mandate, N.Y. Times (Sept. 5, 2024), https://www.nytimes.com/2024/09/05/nyregion/eric-adams-nypd-gun-units-illegal-stops.html.

[8] James Rachels & Stuart Rachels, The Elements of Moral Philosophy (McGraw Hill et al. eds., 10th ed. 2022).

[9] David Rudovsky & Lawrence Rosenthal, *supra* note 4, at 124 –125.

option that produces the greatest number of interests satisfying the greatest number of people.[10] This principle aims to maximize the pleasure of the majority, thereby producing the most units of positive results. However, the problem with this approach is that it overlooks the minority population in New York City and creates a majority-rule situation in which one part of society is always at a disadvantage. In The Elements of Moral Philosophy, philosophers James Rachels and Stuart Rachels explain, "On Utilitarianism, an individual's rights may always be trampled upon if enough people benefit from the trampling."[11] Again, stop-and-frisk fails to work as an effective tool and instead marginalizes certain groups. Third, the equality principle looks to eliminate all hints of bias and establish a system in which all individuals are treated equally. This presents the biggest obstacle to the NYPD's utilitarian approach, as interactions between officers and citizens are *inherently* personal and subjective. Given the inherent biases present in human behavior, it becomes challenging for police officers to navigate intense situations without employing some emotion in their actions. Additionally, as researcher Nicholas Reyes from the CUNY Graduate Center asserts, utilitarians will *consider* everyone equally, not *treat* everyone equally. This is especially likely in a society where there are racial minorities present and are subject to the whims of the majority rule.[12] Thus, stop-and-frisk is inefficient in producing results, discriminatory towards minorities, and fails to consider human nature as an obstacle. Therefore, each of the principles fails, and stop-and-frisk cannot succeed due to its utilitarian nature.

Having established a clear disconnect between utilitarianism as the guiding force of the NYPD, we can now turn our attention to the specific policy of stop-and-frisk. Introduced initially as Stop-Question-Frisk (SQF), this policy sought to offer proactive policing at the height of New York City's crime epidemic in the 1990s.[13] Officers were permitted to stop individuals based on "reasonable suspicion" of criminal activity and could conduct pat-down searches (commonly referred to as frisks) if there was a "reasonable suspicion" that the person was armed or posed a danger to society. Reasonable suspicion could mean anything from nervous behavior to running from the police in public. Upon initial glance, this policy appears to be logical in preventing crime and stopping potential threats. By studying crime data reports, officers could track certain hot spots and conduct routine patrols in these areas to prevent further offenses. However, this approach is also fundamentally utilitarian, as it aims to end crime in the city, no matter how unconventional their methods become, such as stopping a person from having a strange lump in their pocket. Police officers are given the option to stop a person for almost anything, turning them into antagonizers. This narrow approach of using past crime data to predict future human behavior and an unyielding commitment to reducing crime, the NYPD lacked the foresight to recognize the complexities of police-civilian relationships and the relevance of racial biases that come into play during these interactions.

These complexities are exacerbated by centuries of violence and civil rights violations perpetrated against people of color by law enforcement and the government. In the 1990s, the violent beating of Rodney King by the Los Angeles Police Department further fueled Black

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[10] Nicholas Reyes., The Impact of Utilitarian Public Policies on Minority Communities: A Comparison of New York City and New South Wales, Australia (2023) (MA Thesis, The City University of New York), at 5, https://academicworks.cuny.edu/gc_etds/5242.

[11] Rachels & Rachels, *supra* note 8, at 122

[12] Nicholas Reyes, *supra* note 10, at 4.

[13] Michael D. White & Henry F. Fradella, Stop and Frisk: The Use and Abuse of a Controversial Policing Tactic, 1–6 (2016) https://openlibrary.org/books/OL28710620M/Stop_and_Frisk.

mistrust of the police—and rightfully so. There have been countless minority deaths at the hands of police officers, with Eric Garner, Breonna Taylor, Sonya Massey, and so many more being victims of systemic racism, deepening the wound between the people and the police, all while perpetuating a cycle of fear and resentment.[14] Most recently, the Black Lives Matter movement, sparked by the unjust death of George Floyd at the hands of a Minneapolis police officer in 2020, created a tremendous wave of sharp criticism against the police. As a result, there was an enormous push for defunding police organizations and reallocating their million-dollar budgets to social and community services, an alternative to strong-arm policing methods. For years, minorities, specifically people of color, have always distrusted the police, and stop-and-frisk only adds to their anger. Ultimately, this policy fails to actually produce significant results and only heightens the tensions between the NYPD and minority communities.

B. Mayor Adams' Staunch Support of Stop-and-Frisk

When Eric Adams ran for mayor in 2022, he balanced his reputation as a tough-on-crime NYPD captain with promises of a well-trained and reformed anti-crime unit. This followed former mayor Bill de Blasio's decision to disband these units in response to the murder of George Floyd and the widespread outcry sparked by the Black Lives Matter movement.[15] Just a year earlier, in 2023, the NYPD monitor, Denerstein, reported that despite the rebranded "neighborhood safety teams," 97% of those stopped were of Black or Hispanic descent, and at least one-fourth of those stops appeared unconstitutional.[16] In 2024, Denerstein released not one but two separate reports detailing the racial disparities present in the NYPD's stop-and-frisk policies.[17] In a press conference, Eric Adams defended the practice, stating, "You do not say, 'Take away the tool because it is not popular' if the tool is successful."[18] Adams reinforces the utilitarian approach under the notion that the ends will eventually justify the means, even though stop-and-frisk is wildly unpopular amongst minorities. Despite stop-and-frisk disproportional targeting of people of color, fueling racial profiling, and creating more mistrust in police officers, supporters will still agree that the practice is effective. The singular argument the NYPD and Mayor Adams have supporting their claim is the numbers. Indeed, since taking office, Adams has confiscated around 17,000 guns from the streets. Yet, as any good social science professor would emphasize, correlation does *not* equal causation. The NYPD has undergone drastic changes over the last few decades, with reforms made on every level. To attribute these victories solely to stop-and-frisk is incredibly misleading. Researchers have pointed out that the number of successful stop-and-frisk outcomes is surprisingly low compared to the number of incidents involving innocent individuals. With both sides refusing to give up. The proposed solution offered is to retain stop-and-frisk alongside a complete overhaul of how NYPD officers operate and interact with minorities. However, as this paper examines, the utilitarian approach to the

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[14] Renée Ater, List of Unarmed Black People Killed by Police, On Monuments Blog (May 29, 2020), https://www.reneeater.com/on-monuments-blog/2020/5/29/in-memoriam-i-cant-breathe.
[15] Corey Kilganon, N.Y.P.D. Anti-Crime Units Still Stopping People Illegally, Report Shows, New York Times (June. 5, 2023) https://www.nytimes.com/2023/06/05/nyregion/nypd-anti-crime-units-training-tactics.html.
[16] Mylan Denerstein, Richard Jerome, Anthony Braga, Jennifer Eberhardt, Demosthenes Long, John MacDonald, James McCabe, Jane Perlov, James Yates, Nineteenth Report of the Independent Monitor, NST Compliance Report. 23, (2023).
[17] Mylan Denerstein, Richard Jerome, Anthony Braga, Jennifer Eberhardt, Demosthenes Long, John MacDonald, James McCabe, Jane Perlov, James Yates, Twentieth Report of the Independent Monitor, NST Compliance Report (2024), *supra* note 6.
[18] Hurubie Meko & Emma G. Fitzsimmons, *supra* note 7.

NYPD's structure and policies leaves little room for achieving this compromise.

III. Literature Analysis

A. The Stepstones to Stop-and-Frisk

This history of stop-and-frisk dates back to the late 60s when the Supreme Court presided over *Terry v. Ohio*.[19] In late 1963, John W. Terry and two other men were observed by a plainclothes police officer to be conducting a stakeout of a potential robbery. The officer proceeded to stop and frisk the three men, which resulted in him finding weapons on two of them. Terry was convicted of carrying a concealed weapon and was sentenced to three years in jail. Terry then filed an appeal to the Supreme Court because he believed his Fourth Amendment rights were violated. In a majority decision, the Warren Court affirmed that an officer had the constitutional right to stop-and-frisk a person if there was "suspicious behavior."[20] In the majority opinion, Chief Justice Earl Warren stated, "The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man, in the circumstances, would be warranted in the belief that his safety or that of others was in danger."[21] Thus, stop-and-frisk, then known as a "Terry stop," was found permissible by the highest court in the nation. This case laid the foundation for how stop-and-frisk would be applied for generations to come, including *Floyd*.

In *Illinois v. Wardlow,* the Supreme Court was faced with the question of whether a person's sudden, unprovoked flight from police officers in a known crime hot spot was sufficient enough to justify a Terry stop.[22] Similar to *Terry*, a gun was found on Sam Wardlow's person after the stop. While the lower courts dissented, stating that simply leaving hastily was not enough to justify a stop, the Rehnquist Court affirmed (in a 5-4 decision) that police officers who stopped a person whom they believed to be involved in criminal activity did not violate the Fourth Amendment, especially if that person appeared to be running from the police. Chief Justice Rehnquist wrote in the majority opinion that "nervous, evasive behavior is a pertinent factor in determining reasonable suspicion."[23] By offering this vague understanding of actions that justified stop-and-frisk, the judiciary granted greater power to police departments to conduct this practice.

More recently, in 2009, the Roberts Court unanimously agreed in *Arizona v. Johnson* that officers do not violate a person's Fourth Amendment protection against unreasonable searches and seizures when making a routine traffic stop and engaging in consensual conversation with said officers.[24] In the unanimous statement opined by Justice Ginsburg, the court held that lawful traffic stops entail the "temporary seizure of driver and passengers," which legally continues for the full duration of the stop.[25] Consequently, any contraband or weapons found during this time are entirely admissible in court, even though Johnson had given no hints of suspicious behavior and was initially pulled over for a "mandatory insurance suspension." Until the officers

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[19] Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).
[20] *Id*. at 24, 1881.
[21] *Id*. at 27, 1883.
[22] Illinois v. Wardlow, 528 U.S. 119, 120 S. Ct. 673, 145 L. Ed. 2d 570 (2000).
[23] *Id*. at 119, 674.
[24] Arizona v. Johnson, 555 U.S. 323, 129 S. Ct. 781, 172 L. Ed. 2d 694 (2009)
[25] *Id*. at 333, 788.

concluded the stop, they retained the right to inquire about anything about Johnson or his vehicle. Much like the precedents set in *Terry* and *Wardlow*, a weapon and marijuana were discovered on Johnson's person, leading to his subsequent arrest. The court once again expanded police power by affirming that even if a person did not display suspicious behavior, if a stop produced positive results, meaning illegal weapons or contraband was found, then officers had the right of way in the eyes of the law. This case appears to blatantly override the protection against unreasonable search provided by the Fourth Amendment.

Based on these previous cases, the Supreme Court typically favored the use of stop-and-frisk, providing rulings that, while legitimate, are somewhat influenced by hindsight bias in ascertaining whether this practice is unconstitutional. However, this all shifted following the case forming this paper's bedrock, *Floyd v. City of New York*.[26] In theory, stop-and-frisk appears effective at reducing crime; however, up close, we begin to notice the various shortcomings of the practice. Given the high rates of crime in New York City in the late 90s—including corruption, bribery, murder, assault, gangs, mob families, and illegal drugs—the NYPD was operating on overdrive to ensure the city's safety. Soon enough, the city's top brass scrambled to find answers to this crisis and ultimately settled on implementing stop-and-frisk policies as a means of stopping crime from occurring in the first place.

B. The Debate Over Stop-and-Frisk's Efficacy

Decades after this implementation, the NYPD performed millions of stop-and-frisks. Slowly, a pattern began emerging: a startling number of those stopped by the police turned out to be minorities, specifically African American and Latino men. Of the 4.4 million stop-and-frisks performed between January 2004 and June 2012, a staggering 80% of those stopped were African Americans or Latinos.[27] Eventually, this discrepancy led to the decision handed down to *Floyd*. At the University of Pennsylvania School of Law, Professor David Rudovsky lauded the efforts of Judge Scheindlin in putting an end to the systemic racism that is present in the NYPD's stop-and-frisks. On the other hand, Professor Lawrence Rosenthal, writing from Chapman University School of Law, posits that Judge Scheindlin's indifference to the efficacy of the policies she brands unconstitutional puts the lives of minorities and other citizens at greater risk. Both Rudovsky and Rosenthal present compelling theories on the successes and failures of stop-and-frisk; however, only one effectively demonstrates the risks of such a policy.[28]

When trying to understand why police officers target specific neighborhoods, the NYPD cites its policy of indirect racial profiling, which is a database of local crime reports. Professor Rosenthal expands on his discussion by explaining the phenomenon known as differential offending. Differential offending is a theory that explains how the overrepresentation of minorities in the criminal justice system can be attributed to the fact that minorities commit a higher rate of crimes compared to other groups.[29] By targeting these minority communities, the police argue that they are not engaging in discriminatory actions; they are simply adhering to the utility principle and responding to the numbers presented to them. Logically, this theory appears coherent; the police aren't targeting minorities because they are people of color; they are

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[26] *Floyd*, *supra* note 1.
[27] Rudovsky & Rosenthal, *supra* note 4, at 120.
[28] Rudovsky & Rosenthal, *supra* note 4, 127– 144.
[29] *Id*. at 142– 143.

targeting minorities because, statistically, minorities commit more crimes. Where this theory falls short is by creating a never-ending cycle of overgeneralization and neglect of structural factors fueled by the impersonal quality of utilitarianism. This approach is inherently unconstitutional as punishing one group for the actions of a few individuals within the group violates the Equal Protection Clause. There is no valid reason to subject one group to more stop-and-frisks solely because a select few within the group have been found guilty. Critics may state that crime data is hard to ignore—facts are facts, after all—they fail to recognize how crimes committed by minorities are more likely to be amplified due to systemic racism. Over-policing minority neighborhoods in search of criminal behavior was never the correct solution. Instead of attempting to understand why minorities are more at risk for criminal behavior, the NYPD only sought to make arrests. Research shows that people who grow up with limited access to higher education, increased exposure to violence, and financial strain are more likely to turn to a life of crime. Additionally, the NYPD potentially wastes immense resources by focusing specifically on intervention instead of prevention. Officers focus on solving the problem at hand instead of attempting to understand what is causing the problem, further fueling this vicious cycle. By failing to recognize these nuances in lifestyle and only recognizing the result of reduced crime, the NYPD is, in part, responsible for indirect discrimination.

Additionally, by concentrating solely on the results of their actions, the NYPD overlooks the centuries of discrimination that minorities endured at the hands of white people. These communities are still recovering from these traumas, and this places them at a disadvantage in lifestyle, which, once again, increases their exposure to various risk factors associated with criminal behavior. As Professor Rudovsky asserts, even if these factors predicted future criminal conduct, the alarmingly low success rates of hits reveal how the theory fails to hold up in practice. To illustrate the situation, of the 4.4 million individuals subject to a frisk, only 1.5% were found to be carrying a weapon.[30] Unfortunately, this proactive method of policing fails to recognize a certain sophistication that could be present in crime. It simply assumes that minorities are predisposed to commit crimes because of data provided without considering the underlying causes that have shaped these statistics, and this is where Professor Rosenthal's argument falls short.

Another powerful claim that strengthens Professor Rosenthal's argument is the notion that stop-and-frisk succeeds even when it offers no results. His logic is as follows: even unsuccessful stop-and-frisks can deter potential offenders and help cool off criminogenic hotspots.[31] Rosenthal posits the deterrence theory, in which the threat of punishment or negative consequences (in this case, getting arrested) can discourage individuals from committing crimes in the future. However, as this paper applies the by-product theory, which explains the unintended consequences of an action, potential prevention is not a strong enough reason to enforce stop-and-frisk all over New York City. Rosenthal only evaluates the utilitarian approach of maximizing actions for the best outcomes, but fails to consider how this would net out in the long run. Professor Rudovsky expresses that a success hit rate of only 6% in arrests out of 4.4 million stops indicates that a mere by-product of the policy is insufficient to support its continuation. Essentially, there must be a stronger reason to uphold an inefficient policy, such as stop-and-frisk.

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[30] Rudovsky & Rosenthal, *supra* note 4, at 124.
[31] *Id*. at 130.

Proponents of stop-and-frisk also fail to notice a significant empirical irregularity present in the practice. Former mayor Michael Bloomberg and current mayor Eric Adams often credit the drop in crime to stop-and-frisk policies exclusively. Indeed, crime has been decreasing, but many are quick to maintain that the NYPD's implementation of several "get tough" policies has been the reason for this. Professor Rudovsky notes that in the first quarter of 2013, following a 50% reduction in stop-and-frisks in New York City, crime rates continued to drop at a steady rate as in previous years.[32] Rudovsky, like Judge Scheindlin, does not argue for completely eradicating stop-and-frisk, only unlawful stops. He believes that legal stop-and-frisks probably played a shared role in decreasing crime in the city. However, the NYPD's various initiatives and practices and broader social and economic factors also contributed causally to shifts in crime rates. While there may be a minor correlation between stop-and-frisk and crime reduction, it does not in any manner imply causation. On a particularly critical note, some strategists argue that this practice generates significant political, constitutional, and human violations, ultimately offsetting any potential crime-control benefits. From a utilitarian perspective, this returns us to a net-zero impact, as any improvement in public welfare is negated by the manner in which it was sought.[33]

Despite Professor Rosenthal's effort to portray stop-and-frisk as a valuable tool for the NYPD, his arguments lack the strength needed to prove the need for the policy. More efficient tools appear to be available to police the city, as evidenced by the decrease in crime. The NYPD was doing something right to aid this decrease, and they should continue with safer, non-discriminatory practices to prevent further strife. In no circumstance should racial justice be compromised to strengthen public safety, especially if there are other solutions available.

C. Policing, Power, and the Real Cost of Broken Windows

When the NYPD began its proactive policing methods in the late 1990s, it did so on the assumption that, unless prevented, serious crime would evolve from minor infractions. This is known as the "Broken Windows" theory, which suggests that visible signs of disorder in a neighborhood, such as burglaries, graffiti, public nuisance, and, of course, broken windows themselves, can lead to an increase in crime, as the perceived absence of consequences may embolden criminals. However, as Columbia professor Bernard Harcourt concludes, this theory is a facade strategically used to fund the more lucrative fields of real estate development.[34] Thus, it becomes clear who truly benefits from stop-and-frisk–the wealthy. Broken windows have accelerated the criminalization of people of color in underdeveloped neighborhoods, driven by pro-development schemes orchestrated by business people and city planners. The utilitarian search for order resulted in ulterior motives influencing the lives of poorer communities. Researchers have identified a historical link between gentrification and real estate development, highlighting how the over-policing of minority neighborhoods using zero-tolerance methods disproportionately impacts these communities.[35] A notable example of this urban planning strategy is in Harlem, a historically Black community. The "clean-up" efforts in Harlem were aimed at enhancing the reputation of nearby Columbia University, a prestigious school, ultimately allowing the institution to acquire substantial real estate left behind by displaced

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[32] *Id*. at 125.
[33] Michael D. White & Henry F. Fradella, *supra* note 12, at 5–6.
[34] Nicholas Reyes, *supra* note 10, at 7–8.
[35] Nicholas Reyes, *supra* note 10, at 10–11.

residents.[36] It is important to point out that the government paid certain residents, and others chose to leave, but most of them had essentially left due to the over-policing present in Harlem. Additionally, over-policing is disruptive to residents as a constant police presence may contribute to anxiety and uncertainty. With all of this being considered, it is clear that stop-and-frisk was not in the practice of considering the happiness of the Black community of Harlem and instead violated the equality principle by offering wealthier organizations benefits at the expense of minorities.

Similarly, attorney and activist Andrea Ritchie observes that "Broken Windows" policing mirrors vagrancy laws, which were used to criminalize and control the movements of so-called "undesirable" people. These groups were usually Indigenous groups, formerly enslaved African Americans, immigrants, women, the homeless, and poor people.[37] These communities are typically the most susceptible to poverty and, therefore, criminal activity in a city like New York. Under former mayor Rudolph Giuliani, "Broken Windows" policing was presented as the singular solution to combat crime, and to his credit, this policy was successful in contributing to the decrease in crime.[38] However, Giuliani and his administrators applied the distinctly utilitarian approach of examining results, completely ignoring the fear-mongering tactics they had used to convince New Yorkers that their options were limited to proactive policing or nothing. This mindset resonates with Bentham's intellectual successor, John Stuart Mill, who similarly argued that utilitarianism should prioritize outcomes over individual rights.[39] When applying this logic to stop-and-frisk policies, however, a conflict emerges. A 2003 National Bureau of Economic Research report concluded that the most consistent crime reduction in the city correlated with arrest rates. For instance, a 10% increase in burglary arrests led to a 3.2% decrease in burglaries. Initially, a utilitarian might argue that such outcomes indicate a net positive for society—fewer burglaries mean increased safety. However, we have established that only 6% of stop-and-frisk encounters led to arrests. In other words, stop-and-frisk could not account for a meaningful reduction in burglary arrests, undermining its effectiveness as a crime prevention strategy. If consistent crime reduction correlates with arrest rates, the overall decrease in crime in the city could not have been attributed to stop-and-frisk, given that it was responsible for only 6% of stop-and-frisk arrests. This lack of correlation weakens the utilitarian rationale for using stop-and-frisk as an effective crime reduction strategy, as the observed results are independent of its cause.

Utilitarianism advocates actions that aim to improve society, but the inherently human nature of crime prevents the NYPD from applying utilitarian practices. To comprehend why minorities are targeted at higher rates in stop-and-frisk, it is essential to understand the mindset of the officers sworn to serve and protect the community. In the case of an individual officer who is confronted with challenging and complex situations that require immediate action, there are times when they must reach beyond their departmental training. Officers must then rely on their moral compasses, and if certain officers have racial prejudices, then a potentially hostile exchange could occur. This gap between the utilitarian principle of treating everyone equally and the intrinsic motivators that an officer may hold could essentially be the explanation as to why stop-and-frisk is so disproportionately represented in minorities. Rory Kramer and Brianna

[36] Nicholas Reyes, *supra* note 10, at 13.
[37] Nicholas Reyes, *supra* note 10, at 7–8.
[38] Nicholas Reyes, *supra* note 10, at 9.
[39] Rachels & Rachels, *supra* note 8, at 119.

Remster, researchers from Cambridge University Press, elaborate on how certain implicit biases may lead to more frequent violence against Black people than White people. Implicit biases are unconscious attitudes, stereotypes, or prejudices that affect how we perceive the world and its people. In the case of stop-and-frisk, police officers may view the behavior of Black individuals as more suspicious than that of White individuals.[40] Additionally, there has been evidence of increased violence against Black people following the murder of a police officer by a Black suspect. This fundamentally violates the Equal Protection Clause of the Fourteenth Amendment, as you cannot treat people differently under the eyes of the law. Kramer and Remster conducted their experiment to assess the potential likelihood of police stops involving the use of force, ensuring that their findings were net of all other explanations such as suspect behavior, success of the hit, and neighborhood statistics.[41] The results revealed that Black civilians face a 27% higher likelihood of experiencing force during a stop and a 28% higher likelihood of officers drawing their guns than their White counterparts.[42] The problem that stop-and-frisk creates is essentially twofold: on the one hand, minorities are being stopped at disproportionate rates, and on the other hand, their neighborhoods become over-policed due to inherent biases within the system. This corruptive cycle continues to perpetuate violence and distrust of government within the communities, highlighting the need for reform.

IV. Discussion

A. The Flaws of Utilitarianism in Policing

At its core, utilitarianism is a philosophical framework that emphasizes evaluating the morality of actions based on their outcomes and prioritizes the happiness of the majority. The New York Police Department (NYPD) has consistently applied this logic when attempting to reduce crime and prevent future offenses in the city. Home to over 8 million residents, the NYPD began enforcing a series of get-tough initiatives, including stop-and-frisk, to tamp down on crime. Upon initial assessment, stop-and-frisk appeared effective in reducing crime. However, that was before researchers began to notice that a majority of those stopped by the police were minorities or people of color. The inability of stop-and-frisk to help those who needed protection the most was driven by flawed ideas such as "Broken Windows" and differential offending. Deteriorating police relations with citizens further exacerbated the situation due to a history of violence against minorities. In her ruling in *Floyd*, Judge Scheindlin emphasized that stop-and-frisk policies must be monitored and revamped to prevent further violations of the Fourth and Fourteenth Amendments. A federal monitor was appointed, and for a brief period, *Floyd* was successfully applied. However, in 2023 and 2024, the monitor reported findings of ongoing disparities in the way minority communities were subject to policing.

Unfortunately, no amount of restructuring or oversight will efficiently reduce stop-and-frisk to a mere police tactic and not a discriminatory practice. Based on previous examples, we can examine how police-minority relations worsen following "oversight." In 2014, Eric Garner was placed in a chokehold by the NYPD despite repeatedly telling officers that he could not breathe. Despite Garner's death coming after increased department training and

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[40] Rory Kramer & Brianna Remster, Stop, Frisk, and Assault? Racial Disparities in Police Use of Force During Investigatory Stops, Law and Society Review, 52 (4), 960 – 993 (2018), at 965, http://www.jstor.org/stable/45093949.
[41] *Id.* at 976.
[42] *Ibid.*

post-*Floyd*, it becomes evident that racial disparities in the force did not decline.[43] Accusations of racial discrimination have long followed the NYPD since then, and they have only grown following the death of yet another person of color. Unfortunately, reforms cannot change unconscious human bias perpetrated by individual officers. Angela Ritchie further elaborates by asking how we might ensure that skin color will not become the standard for determining the value of a person. She questions, "We might agree that a certain behavior makes one person more undesirable than another, but how do we ensure that age or skin color or national origin or harmless mannerisms will not also become the basis for distinguishing the undesirable from the desirable?"[44] Unfortunately, a predisposition to judge one human being for their background is something no test or reform can alter, and therefore, in essence, violates the equality principle. In theory, utilitarianism seems like a great way to run a police department free of prejudice and full of efficacy. Ironically, utilitarianism is similar to stop-and-frisk in that they both symbolize the ideal world in which everything has an exact answer. Unfortunately, the act of policing is anything but impersonal and clear-cut; it requires the active action of looking back, learning from past mistakes, human connection, and finding solutions that benefit the entirety of society.

B. Rethinking Policing for a More Equitable Future

While advocating for the removal of stop-and-frisk, it is still essential to recognize the efforts of the NYPD in helping to decrease crime altogether. Different initiatives can be taken to create a better-run department that can maintain law and order throughout society. More personal training initiatives allowing officers to build better community relations are possible. Critics may argue that community-based policing is only possible in smaller areas, but unfortunately, this excuse does not hold. A study conducted by the University of California, Los Angeles (UCLA) presents the "Community Safety Partnership" within Los Angeles, a city of nearly 4 million.[45] This study demonstrated that by promoting partnerships between law enforcement officers and their communities, police were better informed when responding to 911 calls.

Additionally, a stronger sense of trust and duty was created by assigning officers to patrol their neighborhoods. Thus, more accepting and positive policing strategies can be introduced, ones that do not infringe on the rights of minorities, as seen in Los Angeles. It may seem hard to enforce, but unfortunately, this is a problem the city has been avoiding for too long; change must start somewhere. For this, New York City looks toward the current mayor, Eric Adams. Similar to his predecessors, Giuliani and Bloomberg, Adams is tough on crime and has been pushing the NYPD and its massive force towards this agenda. While this is a valiant feat to take on, Adams is carrying on tactics that have been deemed unconstitutional. Studies done by the New York Civil Liberties Union display how stops have skyrocketed to over 5,000 under his policies.[46] It remains to be seen when Mayor Adams will face oversight for this dramatic exercise of power. Worsening these concerns, Adams and his administration recently faced federal investigation for several charges, including bribery, corruption, and fraud.[47] With the upcoming 2025 mayoral

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[43] Rory Kramer & Brianna Remster, *supra* note 40, at 970.
[44] Nicholas Reyes, *supra* note 10, at 12–13.
[45] *Id.* at 26 –27.
[46] N.Y. Civil Liberties Union, NYPD Stops Are Skyrocketing Under Mayor Adams, https://www.nyclu.org/commentary/nypd-stops-are-skyrocketing-under-mayor-adams (last visited Nov. 10, 2024).
[47]Michael Rothfeld, Nicole Hong & Bianca Pallaro, Here Are the Charges Eric Adams Faces, Annotated, New York Times (September 29, 2024) https://www.nytimes.com/interactive/2024/09/26/nyregion/eric-adams-indictment-charges-annotated.html.

election, it will be interesting to witness how Eric Adams will position himself with respect to his policing methods in order to secure the vote of the more progressive Democrats.

V. Conclusion

The story of stop-and-frisk spans decades and dozens of cases. From an ideological perspective, stop-and-frisk appears to be a reasonable policy meant to decrease crime based on rigid guidelines of what crime looks like. Unfortunately, human beings are anything but reasonable; we have acted strangely or suspiciously before and have been guilty of forming misconceptions about certain groups of people. This is what makes us human and precisely what makes stop-and-frisk unethical. By assuming that officers can rightly judge a person's future actions based on a few seconds of eyewitness accounts and generic descriptions of what suspicious characters look like, the capacities of the NYPD are severely overestimated. Placing increased reliance on individual officers' split-second judgments exposes the inherent limitations of human bias and error, especially when actions are taken without sufficient context or oversight. This is not to say that the total quality and efficiency of the NYPD should be called into question. As the largest police force in the nation, the officers of New York City successfully helped curb crime through the use of ethical systemic practices. But, in the case of stop-and-frisk, what initially appeared to be a successful solution to crime has been unveiled as nothing more than a placebo effect, convincing New Yorkers and officers alike to think that minorities mainly perpetrate crime. Mayor Adams' recent leadership has only added fuel to this fire, as continued reports of inconsistencies in policing minorities have only grown during his term. Therefore, we should aim to remove stop-and-frisk policing and close this chapter of damaging, discriminatory practices. Instead, alternative practices, such as larger investments in community policing, better access to social services, and greater economic opportunities for underserved neighborhoods, should be implemented. These alternative practices would revitalize communities and address the root causes of crime. By shifting its focus from proactive policing tactics to preventative strategies, the NYPD can begin to secure a safer future for the citizens of New York City.

Article

Analysis of New York Rent Stabilization Law in Remedy and Relation to Housing Crisis

Maya Demchak-Gottlieb, Allyson Poyker

Amidst America's current housing crisis, supply and demand for housing has reached an all time inequality, with a great number of low income individuals struggling to secure housing due to lack of availability and affordability. But how is the New York State system specifically addressing these imminent concerns of the housing crisis? While the answer to this question is incredibly multifaceted, one of the most prominent solutions to minimizing the impacts of the housing shortage is the implementation of a form of rent regulation, called rent stabilization. Rent stabilization in New York State was established in 1969[1], a policy that controls rent increases by a landlord and is subject to approval by a state commission.

Rent Stabilization has undergone significant changes following its implementation, especially with the passing of the Housing Stability & Tenant Protection Act (HSTPA) of 2019[2] which established that tenants who pay a preferential rent on or after June 14, 2019, are entitled to retain the preferential rate as long as they continue to rent the property. Moreover, events such as the 2008 Financial Crisis and the COVID-19 pandemic worsened the state of the housing crisis, prompting legislative action by the Rent Guidelines Board of New York City. This article offers a comprehensive examination of the history of Rent Stabilization, a comparative analysis of the 2008 financial crisis and the recent economic downturn incited by the COVID-19 pandemic, as well as legal challenges to Rent Stabilization by New York City landlords.

[1] New York City Rent Guidelines Board, Rent Stabilization FAQs, NYC Rent Guidelines Board (last visited Nov. 15, 2024, 3:07 PM), https://rentguidelinesboard.cityofnewyork.us/resources/faqs/rent-stabilization/#:~:text=New%20York%20City%20has%20a,are%20covered%20by%20rent%20stabilization.

[2] Housing Stability and Tenant Protection Act of 2019, ch. 36, 2019 N.Y. Laws (codified as amended in scattered sections of N.Y. Real Prop. Law §§ 2201, 2261, et al. (McKinney 2020)).

Introduction

The national housing crisis has been a prevalent issue for several decades in the United States. According to the National Low Income Housing Coalition, there is a shortage "of more than 7 million affordable homes"[3] for the 10.8 million extremely low-income families within the United States". As a result, there has been an avid discussion as to how to counteract the housing shortage. As one of the most over-populated states in America, New York State finds itself at the forefront of the housing crisis conversation.

On February 20th of 2024, the Supreme Court of the United States officially denied challenges[4] to New York City's rent stabilization laws despite the attempted petition for certiorari on behalf of 335-7 LLC, FGP 309 LLC, 226 LLC, 431 HOLDING LLC, and 699 VENTURE CORP.[5](New York City property owning LLC's) and 74 PINEHURST LLC, 141 WADSWORTH LLC, 177 WADSWORTH LLC, DINO PANAGOULIAS, DIMOS PANAGOULIAS, VASILIKI PANAGOULIAS, EIGHTY MULBERRY REALTY CORPORATION[6] (Group of New York City Landlords). Both sets of plaintiffs initially separately filed for petitions against the current New York City Rent Stabilization Laws, however, their cases were joined together due to their commonality in claim and agenda when addressed by the Supreme Court.

Within their petition, the plaintiffs, who were landlords, in 335-7 LLC et al v. City of New York court case[7] had claimed that the Rent Stabilization Law: Housing Stability & Tenant Protection Act (HSTPA) of 2019[8] unjustly seizes private property and allocates it to non-public uses, without properly reimbursing the landlords for the unjust confiscation. The plaintiffs reference the Fifth and Fourteenth Amendments as well as 42 U.S.C. § 1983 to stress the absence of due process[9], which entitles citizens to receive protection against being "deprived of life, liberty or property without due process of law.[10]" Alongside, the plaintiffs of 335-7 LLC, The

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[3] Why We Care: The Problem, National Low Income Housing Coalition (last visited Nov. 15, 2024, 2:13 PM), https://nlihc.org/explore-issues/why-we-care/problem.
[4] Ayiesha Beverly, SCOTUS Declines to Hear New York Rent Control Case, National Apartment Association (last visited Nov. 15, 2024, 5:05 PM), https://www.naahq.org/scotus-declines-hear-new-york-rent-control-case.
[5] 335-7 LLC v. City of New York, 524 F. Supp. 3d 316 (S.D.N.Y. 2021), aff'd, No. 21-823, 2023 WL 2291511 (2d Cir. Mar. 1, 2023).
[6] 74 Pinehurst LLC v. State of New York, 59 F.4th 557 (E.D.N.Y. 2020), aff'd, Nos. 21-467(L), 21-558(Con), 2023 WL 1769678 (2d Cir. Feb. 6, 2023).
[7] *335-7 LLC*, 524 F. Supp. 3d at 316.
[8] Housing Stability and Tenant Protection Act of 2019, 2019 N.Y. Laws ch. 36.
[9] 42 U.S.C. § 1983
[10] Due Process, Legal Information Institute, Cornell Law School, (last visited Dec. 1, 2024, 2:48 PM), https://www.law.cornell.edu/wex/due_process

landlords of 74 Pinehurst LLC also claimed violation of the Fourth and Fifth Amendment rights, asserting that the Rent Stabilization Law allocates an indeterminate length of time on a tenant's lease, and its termination is outside of the landlord's control.

The landlords themselves contend that their livelihoods – which depend on the rent they receive from the tenants - were significantly threatened by the enforcement of Rent Stabilization Laws and its seemingly "anti-landlord" policies. As landlords of small to midsize apartment buildings in New York City, the plaintiffs knew all too well of the city's dependence on rent stabilized apartments. More than 2 million[11] individuals living in New York City depend on rent stabilized or rent controlled apartments, therefore the overturning of the challenges made against rent stabilization by 74 Pinehurst LLC, et al. v. New York and 335-7 LLC, et al. v. New York was seen as a massive relief on behalf of tenants living in rent stabilized apartments.

Despite the plaintiffs' petitions to abrogate Rent Stabilization Law, the Supreme Court Justices declined to grant certiorari against the constitutionality of RSL. One of the Supreme Court Justices, Judge Clarence Thomas expressed that the "constitutionality of regimes like New York is an important and pressing question[12]", prompting the discussion of whether or not Rent Stabilization Law may warrant future review in regards to its constitutionality and the rights of New York landlords. Thomas further commented that the case petitioned by the landlords had provided only circumstantial evidence which was insufficient to warrant a broader constitutional analysis of rent regulation regimes. However, Judge Clarence stated that if a case were to have evidence that more directly referenced city regulations, clearly demonstrating how they relate to the unconstitutionality of RSL, then there would be more to evaluate in consideration of the future of Rent Stabilization.

While the state of New York has continued to uphold the Rent Stabilization Law, increasing amounts of landlords have petitioned against RSL. This petitioning has initiated a larger conversation about the existence of Rent Stabilization Law, who it aims to support, and the change it has undergone in light of economically significant events such as the 2008 Financial Crisis and the COVID-19 pandemic. Rent Stabilization remains an incredibly prominent piece of legislation that impacts the lives of millions of Americans, and its attempted abrogation on behalf of certain landlord groups, subsequently threatening the living situation of countless New York City inhabitants who depend on rent stabilization to afford housing.

I. A Brief Overview of New York Rent Stabilization Law:

a. Defining rent stabilization

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[11] New York City Department of Housing Preservation and Development, Memorandum: Rent Regulation (2024), (last visited Dec. 1, 2024, 2:52 PM), https://www.nyc.gov/assets/hpd/downloads/pdfs/services/rent-regulation-memo-1.pdf.

[12] Amy Howe, Justices reject New York landlords' petition to end rent-stabilization system, Scotus Blog: SCOTUS NEWS (Feb 21, 2024, 9:16 AM), (last visited Dec. 1, 2024, 3:09 PM), https://www.scotusblog.com/2024/02/justices-reject-new-york-landlords-petition-to-end-rent-stabilization-system/.

Rent Stabilization is a form of rent regulation that ensures the affordability of housing units[13]. Housing units under Rent Stabilization cannot be subjected to rent increases above the legal limit set annually by the Rent Guidelines Board. As of now, depending on lease length, often 1 or 2 years, landlords are only allowed to increase rent by 2.75% or 5.25%. Lease renewal is essential as it prevents eviction due to an expired or nonexistent lease. Under rent stabilization, every tenant has a right to lease renewal with identical terms to that of their original lease. Currently, the majority of units under rent stabilization are located within buildings built before 1974, containing 6 or more units. To qualify for rent stabilization, a unit must have been built between February 1, 1947, and December 31, 1973, or, if built before 1947, the current tenant (or their predecessor) must have moved in after June 30, 1971. Additionally, if a building contains 3 or more apartments, undergoing construction or renovation after January 1st, 1974, and received certain tax benefits, it also qualifies for rent stabilization[14]. Fundamentally, Rent Stabilization minimizes the involvement of the landlord in terms of regulating and deciding a tenant's rent, which is especially beneficial for tenants, as a large majority of New Yorkers struggle to afford the high cost of living, "roughly 1,006,000 rent-stabilized homes make up about 28 percent of the overall housing stock and 44 percent of all rentals."[15]

b. Origins of Rent Stabilization Law

Rent Stabilization Law was first enacted in 1969[16], replacing homes built before 1947 that were previously under rent control. To understand the origins of Rent Stabilization and its widespread execution during this time period, it is important to evaluate the concept of "rent control". Rent Control was introduced after World War I in response to a housing shortage marked by slow construction and rising evictions[17]. Following post-World War II, rent control garnered even more popularity as soldiers returning from the war were looking to purchase apartments to settle down with their spouses and kids. Consequently, rent prices skyrocketed, effectively initiating another wave of a housing shortage. An estimated 80 percent of 1940 housing stock[18] (during World War 2) was subject to rent control between 1941 and 1946. Rent control had been the main form of rent regulation up until 1969, in which Rent stabilization was initiated and subsequently became the most popular form of rent regulation. Evidently, one of the key questions when examining different forms of rent regulation is: Why is rent stabilization the more popular form of rent regulation, especially in New York City's population of rent regulated

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[13] Rent Stabilization, NYC Mayor's Public Engagement Unit, (last visited Dec. 1, 2024, 2:58 PM) https://www.nyc.gov/site/mayorspeu/programs/rent-stabilization.page.

[14] Rent-Stabilized Housing, New York City Bar Association, (last visited Dec. 1, 2024, 3:00 PM) https://www.nycbar.org/get-legal-help/article/landlord-tenant/types-rental-housing/rent-stabilized-housing/.

[15] Ilaria Parogni and Mihir Zaveri, Understanding Rent Regulation in N.Y.C., The New York Times, (June 22, 2023), (last visited Dec. 1, 2024, 3:23 PM), https://www.nytimes.com/article/rent-stabilized-apartments-nyc.html.

[16] Diane Ungar, Emergency Tenant Protection in New York: Ten Years of Rent Stabilization, 7 Fordham Urb. L.J. 305 (1979). Available at: https://ir.lawnet.fordham.edu/ulj/vol7/iss2/4.

[17] Parogni & Zaveri, Understanding Rent Regulation, supra note 18.

[18] Daniel K. Fetter, The Home Front: Rent Control And the Rapid Wartime Increase in Home Ownership, National Bureau of Economic Research, Working Paper No. 19604 (October, 2013), https://www.nber.org/system/files/working_papers/w19604/w19604.pdf.

apartments, and what differentiates rent control from rent stabilization? One of the main impacts of subjecting such an extensive quantity of apartments to rent control, was the eminent blowback on behalf of the landlords of New York City. Economists Friedman and Stigler (1946)[19] argued that the enforcement of rent control had led to the rapid increase of home ownership, as landlords feeling under-compensated and restricted by price ceilings set by rent control standards chose to sell their properties at "uncontrolled prices" rather than abiding by the "controlled prices" set by the government. Rent stabilization had evidently been an institution that was seen as more favorable and beneficial to tenants rather than landlords.

c. Differentiating rent control and rent stabilization

To distinguish rent control from rent stabilization, we can examine what a lease under both types of regulations entails. In leases written for rent controlled apartments, such a contractual agreement is created between a landlord and a tenant, and considered, "a matter of state law" rather than a private agreement[20]. A tenant's right to their apartment and the rent they pay are strictly set by state law. To initiate the increase of rent in an apartment subject to rent control, a landlord would have to file a claim to the Division of Housing and Community Renewal (DHCR) and justify the reason for the increase[21]. Any complaints or issues on behalf of the tenant were also to be filed to the DHCR. In contrast, rent stabilized apartments are entitled to a certain annual percentage increase in rent, which is determined by the Rent Guidelines Board (RGB).

d. Rent Guidelines Board

The Rent Guidelines Board is comprised of nine members appointed by the mayor of New York City[22]. The members within the RGB are each appointed as representatives of the interests of different population groups, such as tenants, owners, the general public, and the mayor. The Rent Guidelines Board determines the state-wide allowance for rent increase by referencing detailed reports outlining the condition of the housing stock[23], and current rent that tenants are paying as well as considering landlord operating costs. Some of these reports include: Housing NYC: Rents, Markets and Trends, Housing Supply Report, Mortgage Survey Report, Income and Affordability Study, etc.[24] The Rent Guidelines board is responsible for overlooking and delineating the set amount of annual rent increase allowed for rent stabilized units.

II. Rent Stabilization Law in the Wake of the 2008 Financial Crisis

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[19] Fetter, supra note 20

[20] Rent Stabilization and Rent Control, Fact Sheet #1, Homes and Community Renewal Office of Rent Administration (Jan. 1, 2024), (last visited Dec. 1, 2024, 9:55 PM), https://hcr.ny.gov/system/files/documents/2024/01/fact-sheet-01-01-2024_0.pdf.

[21] Rent Control, What is Rent Control?, Met Council on Housing, (last visited Dec. 1, 2024, 9:17 PM), https://www.metcouncilonhousing.org/help-answers/rent-control/

[22] Board & Staff, N.Y.C. Rent Guidelines Board, (last visited Dec. 1, 2024, 9:16 PM), https://rentguidelinesboard.cityofnewyork.us/about/board-staff/.

[23] Parogni & Zaveri, *Understanding Rent Regulation*, *supra* note 18.

[24] RGB Research Reports, N.Y.C. Rent Guidelines Board, (last visited Dec. 1, 2024, 9:21 PM) https://rentguidelinesboard.cityofnewyork.us/research/.

To further understand the change and motives of the progression of legislation in relation to Rent Stabilization, we must take into account the state of the American economy during the Great Recession, a period of economic downturn that occurred from 2007 to 2009 due to the proliferation and failure of subprime mortgages[25]. Prior to the Great Recession, the only other comparable point of heightened economic failure within the American economy was the Great Depression, taking place from 1929 to 1939 due to the crash of the stock market. To understand the origins and cause of the Great Recession we must evaluate the shift in interest rates throughout the 2000s. In 2001, the Federal Reserve lowered interest rates (until mid-2004) to an all time low because of the Bretton Woods Agreement, in which the U.S. dollar's value was attributed to the value of gold[26]. The Federal Reserve had taken this course of action due to events such as the 9/11 terrorist attacks as well as "the dotcom bubble implosion", which had effectively pummeled the state of our national economy[27]. The "dotcom bubble implosion" was caused by heightened and risky investment into information technology and telecommunication IPOs (Initial Public Offerings) without regard to the viability of the company's business models[28]. As a result of the lowered federal interest rates there was a "boom" in real estate and financial markets, inducing a peak in national mortgage debt. During the successful era of the Housing Market, Government sponsored enterprises such as Fannie Mae (The Federal Nation Mortgage Association FNMA) and Freddie Mac (Federal Home Loan Mortgage Corporation FHLMC created new financial innovations such as subprime and adjustable mortgages[29]. These new types of mortgages gave borrowers the ability to access home loans with "generous terms" which were only "generous" on the basis that federal interest rates would continue to remain at a low rate, and home prices would continue to rise[30]. Evidently, the creation of subprime and adjustable mortgages (home loans with variable interest rates) was to the detriment of the U.S. economy as they resulted in too much financial risk for certain individuals to undertake. A subprime mortgage is defined as a loan that has an adjustable rate, typically a higher interest rate than the rate of an average prime mortgage[31]. Subprime mortgages are often offered to individuals with "impaired credit records" (or bad credit) as they recompense lenders (often banks) for taking on excessive risk with lending to such borrowers. One might ask themselves: Why would a person undertake such a risky loan paired with exorbitantly high interest rates? The short answer: the appreciation of home value. As the housing market continued to experience unprecedented growth, borrowers believed that rising home values would offset their high interest

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[25] The Investopedia Team, Great Recession: What It Was and What Caused It, Investopedia, (last visited Dec. 1, 2024, 10:21 PM), https://www.investopedia.com/terms/g/great-recession.asp.

[26] James Chen, Bretton Woods Agreement and The Institutions It Created Explained, Investopedia, (last visited Dec. 1, 2024, 10:24 PM), https://www.investopedia.com/terms/b/brettonwoodsagreement.asp.

[27] Great Recession, supra note 27.

[28] The Late 1990s Dot-Com Bubble Implodes in 2000, Goldman Sachs, (last visited Dec. 1, 2024, 10:28 PM), https://www.goldmansachs.com/our-firm/history/moments/2000-dot-com-bubble.

[29] The Nature and The Origin of The Subprime Mortgage Crisis, San José State University Department of Economics, (last visited Dec. 1, 2024, 10:33 PM) https://www.sjsu.edu/faculty/watkins/subprime.htm.

[30] Great Recession, supra note 27.

[31] What Is a Subprime Mortgage?, Consumer Education, Consumer Financial Protection Bureau, (last visited Dec. 1, 2024, 10:36 PM), https://www.consumerfinance.gov/ask-cfpb/what-is-a-subprime-mortgage-en-110/.

rates, and those who had especially bad credit were now able to envision a future of home ownership, which was a coveted staple of the American dream.

While it seemed like this period of distributing subprime loans to individuals with bad credit without repercussions would last forever, it unfortunately but inevitably met its end. From mid 2004 to 2006, the Federal Reserve progressively raised interest rates to control inflation, therefore lowering "the flow of new credit" through banks into the real estate industry[32]. The increase in interest rates resulted in borrowers with subprime mortgages no longer being able to finance their mortgages, causing borrowers to start selling their homes, this phenomenon caused the burst of what was known as "the housing bubble".[33] Since the high demand for housing was essential to the existence of "the housing bubble," when borrowers began to sell their houses due to high interest rates that they could not afford to finance, there was now an abundance of homes on the market, eliminating that high demand for housing, therefore "bursting" that bubble.[34] The value of homes dropped dramatically, as well as investment in real estate. With people no longer being able to pay back their mortgages and the value of housing dropping faster than ever, foreclosures on homes by banks turned into a common occurrence. Foreclosed homes lost significant value, causing banks to lose large amounts of money. This essentially created a domino effect, with the housing market collapsing, causing the subsequent collapse of many large banking institutions. Big names such as Bearn Stearns and Lehman Brothers had filed for bankruptcy, further plummeting the country into extensive economic ruin[35].

a. Rent stabilization prior to the Great Recession

How does the timeline and history of the 2008 mortgage crisis coincide with rent stabilization policy? During the early 2000s, prior to the 2008 Financial Crisis, the rental market remained relatively stable[36], with rent progressively increasing in relation to the generally strong state of the economy. However, the expansion of the rental housing market had been stalled due to the "house-buying boom" during the 90s and early 2000s. While single family and multi-family rentals "held below 300,000 annually from 1995 through 2004,"[37] homes built for sale had exceeded 1,000,000 units, reaching a historic peak of 1.7 million in 2005. However, this abundant growth in home production and purchase ultimately collapsed during the Great Recession.

b. Rent Stabilization following the Great Recession

From 2005 to 2009 renter household growth had picked up to "more than 600,000 annually as a result of increased foreclosures of homes due to inability to pay off subprime

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[32] Great Recession, supra note 27

[33] The Investopedia Team, What is a Housing Bubble?, Investopedia, (last visited Dec. 1, 2024, 11:14 PM), https://www.investopedia.com/terms/h/housing_bubble.asp.

[34] Great Recession, History, (December 4, 2017), (last visited Dec. 1, 2024, 11:19 PM), https://www.history.com/topics/21st-century/recession.

[35] Great Recession, supra note 27

[36] America's Rental Housing: Meeting Challenges, Building on Opportunities, Rental Market Conditions, Joint Ctr. for Hous. Studies of Harvard University, (last visited Dec. 1, 2024, 11:26 PM) https://www.jchs.harvard.edu/sites/default/files/ahr2011-2-rentalmarketconditions.pdf.

[37] America's Rental Housing, supra note 38.

mortgages. This inadvertently created a large population of "financially stressed renters"[38]. With an increase in demand for rented units, as well as an increase in financially devastated families, there was a significant uptake in demand for rent stabilized apartments. Between 2003 and 2009, the number of renters considered "very low income": income qualifying under less than 50 percent of the area median) had increased from "16.3 million to 18.0 million"[39]. Meanwhile, the number of rental units with affordability suited to the aforementioned low income renters dropped from "12 million to 11.6 million". By 2009, for every 100 "very-low income renter households", there were only 64 affordable and adequate rental units[40]. These sets of statistics exclude extremely low-income households that faced even more daunting odds, with households outnumbering affordable and adequate units "almost three to one"[41].

c. New York Rent Guidelines Board Initiatives

In an attempt to counteract the growing imbalance of supply and demand of rent stabilized apartments in the wake of the 2008 financial crisis, the New York Rent Guidelines Board strengthened a series of initiatives. These initiatives are a part of Rent Stabilization legislation that incentivized the creation of rent stabilized apartments for low income households: Section 421-a Program, J-51 Program, Mitchell-Lama buyouts, Lofts converted to rent stabilized units, Other Additions to the Stabilized Housing Stock and Rent controlled apartments converting to rent stabilization[42]. One of the more prominent initial issues with increasing the number of rent regulated apartments was the age of certain units, which did not adhere to RSL guidelines involving the time period at which the unit had to have been built to be considered for rent stabilization. As a part of the Section 421-a-Program, landlords that owned units that had been recently built, were not obligated to place such units under rent stabilization. Hence, the Rent Guidelines Board decided to incentivize landlords with tax benefits. Subsequently, many landlords placed their units under rent stabilization, completing cost benefit analyses to infer that by allowing their units to be rent stabilized, the tax benefits they incur provide them with more profit in comparison to leaving their units unregulated and determining their rent based on free market price[43]. Similarly, under the J-51 program, landlords who owned units that underwent extensive reconstruction or renovation were also offered tax benefits to encourage the enlistment of their units under rent stabilization. As part of the Mitchell-Lama Buyouts initiative, buildings that are regulated by the federal, state, or city government were not required to be rent stabilized or rent controlled[44]. But if these units were to no longer receive forms of government aid or are

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[38] Rental Market Stresses: Impacts of the Great Recession on Affordability and Multifamily Lending, Urban Institute, Joint Center for Housing Studies of Harvard University, (last visited Dec. 1, 2024, 11:28 PM), https://www.urban.org/sites/default/files/publication/27011/1001550-Rental-Market-Stresses-Impacts-of-the-Great-Recession-on-Affordability-and-Multifamily-Lending.PDF.

[39] Rental Market Stresses, supra note 40.

[40] Rental Market Stresses, supra note 40.

[41] Rental Market Stresses, supra note 40.

[42] Changes to the Rent Stabilized Housing Stock in New York City in 2009, N.Y.C. Rent Guidelines Bd. (Jun. 4, 2019), https://rentguidelinesboard.cityofnewyork.us/wp-content/uploads/2019/08/2009-Changes.pdf.

[43] Changes to the Rent Stabilized Housing Stock, supra note 44.

[44] Changes to the Rent Stabilized Housing Stock, supra note 44.

no longer under government ownership, they may be subjected to rent stabilization laws. Under "article 7-C" of the "multiple dwelling law", buildings that were initially intended to be commercial loft space but are instead turned into residential space, if up to code standard, can become rent stabilized[45]. Stabilized housing stock can also experience increases through other means. Tax incentive programs named "421-g" and "420-c" involve converting non-residential units in Lower Manhattan to residential as well as exempting "low income housing projects" developed in relation to the Low Income Housing Tax Credit Program, from having to pay taxes. Apartments that were once rent controlled can be subject to status change, according to "Chapter 371 of the Laws of 1971", if an apartment is voluntarily vacated on or after July 1, 1971, it can be decontrolled and instead stabilized or no longer be under any rent regulation. These initiatives, having been rewritten and strengthened as a part of a series of dynamic changes implemented to rent stabilization legislation after 2008, had increased the number of rent stabilized apartments. In 2008, many programs contributed to the growth of rent-stabilized stock including Section 421-a which added 1,856 units, J-51 program which added 55 units, Mitchell-Lama Buyouts added 101 units; Loft Units added 35 units, and other additions added 5,632 units. While there was a definite increase in contribution to the rent stabilized stock from the strengthening of these policies, in some instances such as the Mitchell Lama Buyouts Program, the number of units added to the rent stabilized stock in 2008, was very small in comparison to the previous years: 110 units added in 2008, compared to 2,517 units in 2007 and 3,040 units in 2006[46]. What causes the decrease in rent stabilized units added on an annual basis? The programs implemented by the New York Rent Guidelines Board are not properly reinforced by necessary changes in legislation and face expiration, as these units being converted to Rent Stabilized Stock are almost always temporary and subject to expiration.

III. Reinforcement of Rent Stabilization Law

a. Absence of legislation reinforcing rent stabilization law

While Rent Stabilization Law has undergone occasional revisions and slight improvements (such as after the 2008 financial crisis), no major legislation was passed to strengthen and enforce Rent Stabilization requirements and policies until 2019 with the passage of the Housing Stability and Tenant Protection Act (HSTPA). This raises an important question, why was this the case? Rent Stabilization law aims to relieve households of the unmanageable financial burden of paying "unlivable rent". When a household spends more than 30 percent of their income to pay for rent, that is considered unlivable. One in three households spend "at least 50% of their income in rent"[47]. The urgent need for Rent Stabilization to support families that spent disproportionate shares of their income on housing had long been recognized, but fixing this problem was truly easier said than done. One of the long-standing weaknesses of Rent Stabilization policy in New York City was the ease with which landlords could deregulate their

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[45] Changes to the Rent Stabilized Housing Stock, supra note 44.

[46] Changes to the Rent Stabilized Housing Stock, supra note 44.

[47] Les Jacobowitz , Dean A. Roy, NYC's Rent Stabilization Laws Upheld by Supreme Court in Light of Affordable Housing Challenges Nationwide, ArentFox Schiff, (March 22, 2024), (last visited Dec. 1, 2024, 11:53 PM), https://www.afslaw.com/perspectives/alerts/nycs-rent-stabilization-laws-upheld-supreme-court-light-affordable-housing.

apartments. In 1994, Rent Stabilization programs and policies had undergone extensive weakening after the New York City Council implemented vacancy decontrol[48]. Vacancy decontrol was a policy that gave landlords the ability to escape regulation of their units by de-regulating their units once tenants vacated the apartment.

Many units that had an extensive history of rent stabilization were now suddenly listed for exorbitant market prices. An apartment is no longer considered rent stabilized when its monthly rent exceeds $2,000, and once vacated, many landlords quickly increase the rent beyond the 2000 dollar threshold, disqualifying units from being considered rent regulated. The New York City Council voted in favor of vacancy decontrol because New York City had been "struggling with large budget deficits"[49], causing the foreclosure of thousands of buildings as landlords failed to pay their taxes. In retrospect, it was discernibly clear that vacancy decontrol served the interests of New York City landlords, often to the "detriment of tenants". A war was clearly brewing from the mounting pressure to deregulate or reinforce Rent Stabilization policies which placed New York City tenants and landlords on opposing sides. The mounting political pressures of landlords lobbying against Rent Stabilization, such as with the case of landlord groups from 74 Pinehurst and 335 LLC, as well as legislation in regards to “vacancy decontrol”, have all been threatening an institution that millions of New Yorkers depend on.

IV. Reshaping Rent Stabilization Law: Housing Stability & Tenant Protection Act (HSTPA) of 2019

The Housing Stability and Tenant Protection Act (HSTPA) of 2019 significantly strengthened protections for rent-stabilized tenants in New York City, particularly concerning preferential rents. Before its enactment, landlords could offer a preferential rent lower than the legally regulated rent, but they could also revoke this lower rent at the next lease renewal. This practice often discouraged tenant organization and made it difficult for tenants to track their long-term rent burden.

Under the HSTPA, tenants who were paying a preferential rent on or after June 14, 2019, are guaranteed to keep that lower rent for the duration of their tenancy as long as they continue to rent the property. This means that landlords may no longer raise the rent to the total legally regulated rent at lease renewal, providing greater stability and affordability for tenants. Any annual rent increases must be applied to tenants' preferential rent, not the total legally regulated rent. Furthermore, once a tenant vacates the apartment, the landlord may legally charge the next occupant the full legally regulated rent.

While facially beneficial for New Yorkers and the housing market more broadly, HSTPA has faced legal challenges and criticism for producing adverse economic effects.

Critics of HSTPA contend that while intended to protect tenants, it has unintended consequences for landlords and the overall housing market. Increased vacancy rates, deferred maintenance, and potential loss of property tax revenue can negatively impact the city's economy

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[48] Marcelo Rochabrun and Cezary Podkul, The Fateful Vote That Made New York City Rents So High, The Rent Racket, ProPublica (Dec. 15, 2016, 9:00 AM), (last visited Dec. 1, 2024, 11:56 PM), https://www.propublica.org/article/the-vote-that-made-new-york-city-rents-so-high.
[49] Jacobowitz & Roy, supra note 49.

and housing supply. A study commissioned by the Real Estate Board of New York (REBNY) and the Rent Stabilization Association of NYC (RSA) surveyed 781 residential property owners and managers of all types representing a total of roughly 242,000 units - about 11 percent of the City's rental housing stock[50]. The report assessed the effects and economic impacts of the HSTPA on housing availability and quality. It found that since HSTPA was passed, owners are struggling to put rent-stabilized units back on the market once they become vacant. Those after long tenancies and smaller buildings of less than 11 units have been particularly impacted. The vacancy rate is notably higher in smaller buildings that are predominantly rent-stabilized. Owners with small portfolios with moderate rent stabilization have an 18% vacancy rate, while owners with small portfolios that are primarily rent stabilized have a 25% vacancy rate[51]. Longer-term vacancies, defined as three or more years, have trended upward from 2018 to 2023. The economic infeasibility of unit improvements is the most cited reason for continued vacancies. Although landlords must register any Major Capital Improvements (MCI) and Individual Apartment Improvements (IAI) at rent stabilized properties, filings for both have declined by 45% and 77%, respectively[52].

V. Modern Financial Crisis

a. COVID-19 pandemic facilitates housing crisis

Prior to the COVID-19 pandemic, despite low interest rates, rising home prices made it increasingly difficult for first-time buyers to enter the market, particularly in high-cost areas. The shortage of available homes, especially affordable housing, constrained the market and limited choices for buyers[53]. The pandemic exacerbated an already existing strain on the housing market, particularly for low-income and marginalized communities. The pandemic led to widespread job losses and reduced working hours, leaving many individuals and families unable to afford their rent or mortgage payments. While eviction moratoriums were implemented to provide temporary relief, they did not address the underlying issue of housing affordability. Many tenants needed to catch up on their rent payments, leading to a significant backlog of rental debt. The pandemic also created a financial crisis that led to unemployment and, in turn, difficulty securing stable housing.

Considering the disparate impact on already vulnerable and marginalized populations is essential to a nuanced discussion of the housing crisis and rent stabilization laws. Low income individuals were disproportionately affected, as they had fewer resources to weather the economic storm. People of color, who are often overrepresented in low-wage jobs and marginalized communities, faced heightened risks of housing instability. Immigrant communities, particularly undocumented immigrants, were especially vulnerable due to limited access to government assistance and those who were undocumented could not fully capitalize on limited resources due to a fear of deportation.

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[50] "HSTPA Impacts Study." *Rebny*, 29 Feb. 2024, www.rebny.com/reports/hstpa-impacts-study/.
[51] "HSTPA Impacts Study," supra note 52.
[52] "HSTPA Impacts Study," supra note 52.
[53] Gamber, William et al. "Stuck at home: Housing demand during the COVID-19 pandemic." *Journal of housing economics* vol. 59 (2023): 101908. doi:10.1016/j.jhe.2022.101908

Housing insecurity also has consequential long-term instability. It can lead to severe mental health problems, including anxiety, depression, and trauma. Children experiencing housing instability may face developmental challenges and academic difficulties. In addition to the psychological impacts, housing insecurity The struggle to find employment and stable housing creates a self-perpetuating cycle that keeps individuals from moving beyond their financial hardship. Wealth inequality in the U.S. rose steeply between 2007 to 2010, largely as a result of the sharp decline in house prices during that period, Edward N. Wolff reports in Household Wealth Trends in the United States, 1962 to 2016: Has Middle-Class Wealth Recovered? (NBER Working Paper No. 24085)[54]. Median net worth declined from $118,600 in 2007 to $66,500 in 2010. Mean net worth, which is more sensitive to the holdings of high-net-worth households, declined from $620,500 to $521,000 — a drop of 16 percent. By 2016, median net worth had rebounded to $78,100, while mean net worth had reached $667,600, surpassing its 2007 value. The rich tend to have a more diverse range of investments than the middle class, making them less vulnerable to declines in particular asset categories[55]. The middle class tends to be heavily leveraged, with their homes as primary assets. As a result, they were disproportionately affected by the housing crash. Median wealth fell more than house prices from 2007 to 2010[56].

In the wake of the COVID-19 pandemic, supply shortage created conditions for wealthy investors, private equity groups, and corporate property managers to exploit the tight market, squeezing excess profits from renters and crowding out first-time homebuyers.

Data show that these kinds of investors bought almost 1 in 4 homes sold in 2021[57]. Purchases are targeted to specific areas to increase market control, often happening in all-cash sales[58]. In that same year, investors bought more than 30 percent of all single-family homes sold in Georgia, Nevada, and Arizona[59]. Moreover, a MetLife Investment Management report estimates that corporations and private equity firms could own 40 percent of all single-family rentals by 2030.

This market concentration allows large corporate landlords to limit competition, allowing for corporations to price-gouge renters. New algorithmic tools allow these landlords to share market data to limit competition and raise rents seamlessly. Seventy-eight percent of Americans

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[54] Wolff, Edward N. "Household Wealth Trends in the United States, 1962 to 2016: Has Middle Class Wealth Recovered?" *NBER*, 4 Dec. 2017, www.nber.org/papers/w24085.

[55] "Household Wealth Trends in the United States, 1962 to 2016: Has Middle Class Wealth Recovered?," supra note 56.

[56] "Household Wealth Trends in the United States, 1962 to 2016: Has Middle Class Wealth Recovered?," supra note 56.

[57] Katz, Lily. "Investors Bought 26% of the Country's Most Affordable Homes in the Fourth Quarter-the Highest Share on Record." *Redfin Real Estate News*, 14 Feb. 2024, www.redfin.com/news/investor-home-purchases-q4-2023/.

[58] Kaysen, Ronda, and Ella Koeze. "What Happens When Wall Street Buys Most of the Homes on Your Block?" *The New York Times*, The New York Times, 16 Sept. 2023, www.nytimes.com/interactive/2023/09/16/realestate/home-sales-north-carolina-wall-street.html.

[59] Henderson, Tim. "Investors Bought a Quarter of Homes Sold Last Year, Driving up Rents ." *Stateline*, 16 May 2023, stateline.org/2022/07/22/investors-bought-a-quarter-of-homes-sold-last-year-driving-up-rents/.

support action to prevent this anticompetitive behavior, with 54 percent strongly supporting it, making it the most strongly supported policy tested in the survey. The rent-regulation system has been in place for decades to help insulate rents from market forces, and rent-stabilized homes remain a crucial component of New York City's dwindling affordable housing stock. The panel that regulates the rents of roughly one million homes across New York City approved in 2023 increases on one-year leases by 3 percent and on two-year leases by 2.75 percent for the first year and 3.2 percent for the second year[60]. That followed increases on one-year leases by 3.25 percent and on two-year leases by 5 percent the year before — the highest figures in nearly a decade[61] .

As New York City and the country as a whole continue to grapple with the financial devastation of the pandemic, rent-stabilized apartments remain a prominent component of New York City's housing landscape: There are approximately 3,644,000 homes in New York City . The roughly 1,006,000 rent-stabilized homes make up about 28 percent of the overall housing stock and 44 percent of all rentals.[62] A miniscule fraction of the city's housing—about 16,400 homes—is rent-controlled in a separate system[63].

VI. Legal Challenges to the Constitutionality of Rent Stabilization

In October 2023, the Supreme Court denied review of a challenge to the constitutionality of New York's rent-stabilization system. The justices denied review in two cases presenting the same question in February 2024, with Justice Clarence Thomas filing a statement regarding that denial[64].

The rent-stabilization system at the center of *74 Pinehurst v. New York* and *335-7 LLC v. New York* has been in place for over 50 years. It applies to approximately one million homes in New York City – 44% of all rentals. Under the system, a board appointed by the mayor sets the rate at which landlords may increase rents each year, and landlords must generally renew a tenant's lease when it expires.

In both *74 Pinehurst* and *335-7 LLC*, a group of landlords went to federal court to challenge the rent-stabilization system[65]. They argued that the system created a "taking" of property under the Fifth Amendment, both as a general matter and as applied to them. For example, two of the landlords, Dimos and Vasiliki Panagoulias, want to set aside an apartment in their family's building for another family member but are not permitted to do so. Furthermore, the value of their buildings, the landlords said, has fallen as much as 60 to 70%. However, the lower courts rejected those arguments, prompting the landlords to come to the Supreme Court.

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[60] Zaveri, Mihir, and Olivia Bensimon. "Rents for 2 Million New Yorkers to Rise Again This Year." *The New York Times*, The New York Times, 21 June 2023, www.nytimes.com/2023/06/21/nyregion/rent-stabilized-apartment-homes-rise.html.

[61] "Rents for 2 Million New Yorkers to Rise Again This Year," supra 62.

[62] "Understanding Rent Regulation in N.Y.C.," supra 64.

[63] "Understanding Rent Regulation in N.Y.C.," supra 64.

[64] *74 Pinehurst LLC v. New York*, 59 F.4th 557 (2d Cir. 2023), cert. denied, 218 L. Ed. 2d 66 (Feb. 20, 2024)

[65] *335-7 LLC v. City of New York*, 524 F. Supp. 3d 316 (S.D.N.Y. 2021), aff'd, No. 21-823, 2023 WL 2291511 (2d Cir. Mar. 1, 2023)

The landlords in 74 Pinehurst and 335-7 LLC raised several key arguments against New York City's rent-stabilization system[66]. The landlords argued that the rent-stabilization laws constituted a "taking" of their property under the Fifth Amendment, asserting that by imposing rent controls, the government was seizing a portion of their property rights without just compensation. Plaintiffs allege that the RSL affects an unconstitutional taking in violation of the Fifth and Fourteenth Amendments. The Takings Clause of the Fifth Amendment made applicable to the states by the Fourteenth Amendment, prohibits the taking of private property for public use without just compensation. U.S. Const. amend. V; *Dolan v. City of Tigard*, 512 U.S. 374, 383-84, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994). The landlords claimed that the inability to set aside apartments for family members, even in their own buildings, was an unreasonable restriction on their property rights. They argued that this limitation interfered with their ability to use their property as they saw fit. They asserted that rent stabilization had significantly reduced the value of their properties, citing figures of up to a 60-70% decline[67]. This, they argued, was a direct consequence of the rent controls and the limitations they imposed on their ability to generate income from their properties. However, lower courts have consistently rejected these arguments, finding that the rent-stabilization laws were a valid exercise of government power to address housing affordability and protect tenants. The Supreme Court's decision not to hear the case further solidified the legal standing of rent stabilization in New York City.

In 335-7 LLC v. the City of New York, the United States District Court Southern District Of New York differentiated the facts of the case from Horne in that "in *Horne*, the Supreme Court found a law that mandated that raisin growers set aside part of their crop for the government *gratis* was a physical taking. *Id.* at 354-55, 362, 135 S.Ct. 2419. The *Horne* Court reasoned that the law was a "clear physical taking" because it gave the government the full "bundle" of property rights "to possess, use, and dispose of" their subset of raisins. *Id.* at 361-62, 135 S.Ct. 2419 (citation omitted). However, unlike the law in *Horne*, the RSL does not transfer possession or disposal rights from landlords. *CHIP,* 492 F.Supp.3d at 43 (citation omitted)." [68]

The court further rebuked the plaintiffs' claim the RSL is a physical taking, concluding that the RSL is not a physical taking because it does not force a new use of the property, even if it requires the landlord to accept new tenants who may be relative strangers. "*First*, as defined, successors are not strangers; they must have lived with the original tenant for one to two years and must be identified upon the landlords' request. §§ 2523.5(b), 2523.5(e). *Second*, even if successors were strangers, the RSL is not a physical taking as long as it only forces new tenants, not a new use. *Higgins*, 83 N.Y.2d at 173, 608 N.Y.S.2d 930, 630 N.E.2d 626 (finding no physical taking where "the challenged regulations may require the owner-lessor to accept a new occupant but not a new use of its rent-regulated property")."

In dismissing the appeal to the Supreme Court, Justice Thomas wrote "to evaluate their as-applied challenges, we must consider whether specific New York City regulations prevent petitioners from evicting actual tenants for particular reasons. Similarly, petitioners' facial challenges require a clear understanding of how New York City regulations coordinate to

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[66] U.S. Const. amend. V ; *Dolan v. City of Tigard*, 512 U.S. 374, 383-84, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994)

[67] *335-7 LLC v. City of New York,* supra 68.

[68] *335-7 LLC v. City of New York,* supra 68.

completely bar landlords from evicting tenants. The pleadings do not facilitate such an understanding."[69]

While Justice Thomas left open the possibility for future challenges to the law, the court's current refusal to hear challenges provides relief for New Yorkers who rely on the law for protection during a time of deep financial instability and ever worsening income inequality.

Upon the Supreme Court's denial of cert., Selendy Gay, The Legal Aid Society, and Legal Services New York released the following joint statement:

> "Since 1969, New York's Rent Stabilization Laws have protected millions of tenants, preserved affordable housing, and prevented mass displacement and homelessness in a city where the rents are the highest in the country and rising. Today's decision by the U.S. Supreme Court declining to review the Second Circuit's well-reasoned dismissals of these lawsuits is in line with well-established precedent and puts an end to these cases attacking the legal protections depended upon by a million New York households amid an ongoing housing crisis."[70]

New York Mayor Eric Adams expressed approval of the Supreme Court's decision to deny the petitions, saying in a statement, "For 50 years, rent stabilization has kept rents affordable for millions of New Yorkers and their families. Today, tenants can breathe a sigh of relief. As this administration tackles the city's affordability crisis from all angles, we remain committed to defending New York's rent stabilization laws so tenants can afford to stay in their homes and communities."

Conclusion

Rent Stabilization has evolved over time with changes like the passing of the Housing Stability & Tenant Protection Act of 2019. Courts have repeatedly affirmed that governments have the power to regulate markets to serve the public good. In the case of housing, this includes ensuring that people have access to safe, affordable, and stable housing. While property owners have rights, these rights are not absolute. Governments can impose reasonable restrictions on property use to protect the public interest, such as public health, safety, and welfare. Rent stabilization has a long history in the United States, dating back to World War I. It has been used to address housing shortages, economic downturns, and inflationary pressures. Rent stabilization can have both positive and negative economic impacts. While it can protect tenants from displacement and excessive rent increases, it can also discourage investment in rental housing and limit the supply of new units.

The continued legal support for rent stabilization has significant policy implications. It suggests that policymakers can implement and maintain rent stabilization programs without fear of constitutional challenges. However, it also highlights the need for careful policy design to balance the interests of tenants and landlords. The Supreme Court's decision reinforces the idea that rent stabilization is a necessary and lawful measure to address housing affordability

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[69] *74 Pinehurst LLC v. New York*, cert. denied, supra 67.

[70] "Supreme Court Declines Landlord Challenge in Major Victory for Tenants." *The Legal Aid Society*, 20 Feb. 2024, legalaidnyc.org/news/supreme-court-declines-landlord-challenge-victory-tenants/.

challenges in a city like New York, where housing costs are often exorbitant. This decision provides a strong legal foundation for rent stabilization and can help to ensure that millions of tenants have access to affordable housing.

Rent stabilization offers immediate relief to tenants by limiting rent increases and providing protections against arbitrary evictions. Such protections can be especially crucial for low-income households and those facing economic hardship. Rent stabilization also fosters a sense of stability and security for tenants, allowing them to plan for the future and build their lives without the constant fear of displacement. It serves an essential role in the preservation of diverse communities by preventing rapid gentrification and displacement of long-term residents. Furthermore, rent stabilization can have positive economic impacts, as stable housing can lead to increased productivity, improved health outcomes, and reduced reliance on social services. While it is true that addressing the underlying housing shortage is crucial for long-term solutions, rent stabilization offers a practical and immediate approach to protecting tenants' rights and ensuring affordable housing in the short term. It is a policy that serves as a remedy for the housing crisis and has the potential to alleviate suffering and improve the lives of millions of people.

Article

H-1B / H-4 Visa Holders: Navigating Legal Barriers and Economic Disempowerment Under U.S. Immigration Policy

Aishika Yadav

The U.S. immigration system claims to attract global talent but simultaneously marginalizes the children of high-skilled H-1B visa holders, who enter the country on H-4 dependent visas. Despite growing up in the U.S. and excelling academically, these individuals face severe legal, financial, and professional barriers. H-4 visa holders, particularly college students, are ineligible for federal financial aid, barred from work authorization, and struggle to transition to independent visa status before aging out at 21. The restrictive policies leave many with limited pathways to stay in the U.S., forcing them into costly and uncertain alternatives such as F-1 student visas, Optional Practical Training (OPT), or temporary work visas.

The paper examines the historical evolution of the H-1B and H-4 visa programs, highlighting how their rigid structures fail to accommodate the realities faced by dependent children. It explores the exploitation and instability embedded in the system, including workplace vulnerabilities for H-1B workers and the precarious nature of H-4 EAD work permits for spouses. The exclusion of H-4 children from employment authorization exacerbates financial hardship and career stagnation. Furthermore, the legal and political challenges to the H-4 EAD program reveal broader systemic inequities in immigration policy.

The paper argues for urgent reforms, including expanded work authorization for H-4 dependents, streamlined pathways to permanent residency, and greater protections against exploitation. Addressing these issues is crucial to ensuring that skilled immigrants and their families can fully contribute to the U.S. economy rather than remain trapped in an unstable and discriminatory system.

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[1] New York City Rent Guidelines Board, Rent Stabilization FAQs, NYC Rent Guidelines Board (last visited Nov. 15, 2024, 3:07 PM), https://rentguidelinesboard.cityofnewyork.us/resources/faqs/rent-stabilization/#:~:text=New%20York%20City%20has%20a,are%20covered%20by%20rent%20stabilization.

[2] Housing Stability and Tenant Protection Act of 2019, ch. 36, 2019 N.Y. Laws (codified as amended in scattered sections of N.Y. Real Prop. Law §§ 2201, 2261, et al. (McKinney 2020)).

Introduction

The U.S. immigration system prides itself on attracting skilled talent from around the world, yet it simultaneously undermines the very families of these high-skilled workers. Among the most overlooked and disadvantaged are the children of H-1B visa holders—foreign nationals employed in the United States in specialty occupations requiring specialized knowledge and a bachelor's degree or higher—who enter the country on H-4 dependent visas.

Despite growing up in the United States, attending American schools, and often excelling academically, these individuals face severe legal and economic restrictions solely due to their immigration status. Unlike their peers, most H-4 visa holders—particularly college students—are barred from legally working or interning, are ineligible for federal financial aid, and encounter significant obstacles in transitioning to an independent visa status before aging out at 21.[1] As a result, many are forced to leave the country they consider home or scramble for alternative, often inaccessible, visa options.[2] Their experiences highlight the systemic inequities within the current immigration framework and underscore the urgent need for targeted reforms, particularly to address the legal, financial, and professional barriers faced by H-4 visa holders, including the children of H-1B workers. Expanding work authorization, improving access to career development opportunities, and facilitating smoother integration into the U.S. economy are necessary steps to ensure that these individuals are not left behind in an immigration system that claims to value talent and innovation.

The lived experiences of H-4 visa holders underscore the real-world consequences of current immigration policy. One such example is that of a student who entered the United States as a dependent of an H-1B visa holder and has lived in New York for over 15 years. Despite growing up in the U.S. and attending American schools, the legal and financial limitations tied to her visa status became most apparent during her senior year of high school. Like many of her peers, she began researching financial aid options to help fund her college education. However, she soon discovered that federal and state programs such as FAFSA and the New York State

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[1] § 8 C.F.R. § 214.2(h)(9)(iv) (2024).

[2] U.S. Citizenship & Immigration. Servs., *Child Status Protection Act (CSPA)*, https://www.uscis.gov/green-card/green-card-processes-and-procedures/child-status-protection-act-cspa (last visited Jan. 24, 2025).

Tuition Assistance Program (TAP) required a Social Security Number—available only to U.S. citizens or eligible non-citizens—rendering her ineligible for these forms of aid.

The barriers continued into her college years. Without work authorization, she was unable to apply for internships, including unpaid positions. Although unpaid, such internships are often classified as employment under U.S. labor laws and thus require legal work authorization.[3] This lack of access to experiential learning opportunities significantly hindered her ability to develop professional skills and build a competitive résumé.

Now approaching the end of her sophomore year, she faces increasing uncertainty as she nears the age of 21, when she will age out of H-4 dependent status.[1] While transitioning to an F-1 student visa is a possible solution to maintain lawful presence, it comes with new complications—most notably, the requirement to pay out-of-state tuition despite long-term residency and tax contributions in New York. In an effort to minimize costs, she is attempting to accelerate her degree completion and enter law school directly. Yet, with limited time remaining, she must also prepare for the LSAT and complete law school applications—without the benefit of prior work experience.

Optional Practical Training (OPT) under the F-1 visa presents another potential pathway, allowing up to one year of employment after graduation. However, this option is highly competitive and may be less impactful without prior internship experience. Pursuing a master's degree is also a consideration, but this route significantly increases financial and visa-related burdens. Even post-graduation, should she eventually secure an H-1B visa through the lottery system, the lack of a guaranteed path to permanent residency would continue to pose long-term instability.

This case exemplifies the structural challenges that H-4 dependents encounter as they attempt to navigate higher education, professional development, and legal residency in the United States. It highlights the systemic barriers that persist despite years of residence, cultural integration, and contribution to American society—underscoring the urgent need for comprehensive immigration reform that accounts for the unique circumstances of this population.[4]

History

Congress initially established the H visas in the Immigration and Nationality Act of 1952, which primarily focused on allowing foreign workers into the United States on a temporary basis. However, it wasn't until the 1970 amendments to the Act that Congress authorized the admission of spouses and minor children of H visa holders. The 1970 amendments focused primarily on expanding the scope of the H-1 visa, enabling workers to engage in employment that was not strictly "temporary" in nature. Although the issue of family reunification was not explicitly discussed during the legislative debate, the creation of the H-4 visa appears to have been a response to the growing concern over extended family separations due to the changes in the H-1 program. Building on this framework, the H-1B visa was introduced in the Immigration

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[3] *FAQ for CPT* (no date) *Enrollment Management*. Available at: https://enrollmentmanagement.baruch.cuny.edu/international-student-service-center/faqcpt/#:~:text=Because%20USCIS%20uses%20a%20broad,unpaid%20internships%20require%20CPT%20authorization. (Accessed: 09 May 2025).

[4] Employment Authorization for Certain H-4 Dependent Spouses, 80 Fed. Reg. 10,284 (Feb. 25, 2015), https://www.federalregister.gov/documents/2015/02/25/2015-04042/employment-authorization-for-certain-h-4-dependent-spouses.

Act of 1990, which is considered the most sweeping reform in U.S. legal immigration law. Passed by Congress on October 27, 1990, the key distinction between the H-1B and the earlier H-1 visa was that H-1B holders were no longer required to demonstrate "nonimmigrant intent"—meaning they no longer had to prove that they did not intend to settle permanently in the United States. By the 1990s, the H-4 visa had become what it is today: a means for spouses and children of foreign workers to potentially reside in the United States long-term. Also, this change was made to better align with the evolving labor market needs and the increasing demand for skilled foreign workers.[5]

The H-1B Visa System

The H-1B visa is a temporary (nonimmigrant) visa that allows U.S. employers to hire highly skilled foreign professionals in specialty occupations requiring at least a bachelor's degree. Common fields include technology, engineering, mathematics, and medical sciences. Since its creation in 1990, Congress has capped H-1B visas at 65,000 per year, with an additional 20,000 visas for those holding advanced degrees from U.S. institutions. While there is no specific numerical cap on the number of H-4 visas, their issuance is inherently restricted by the cap on H-1B visas.

H-1B visa holders play a critical role in the U.S. economy, often filling labor shortages in high-demand fields. Studies show that an increase in H-1B workers correlates with lower unemployment rates in their respective industries, even during economic downturns. Restrictions on H-1B visas have led U.S. multinational companies to outsource jobs abroad, particularly to India, China, and Canada.[6] India and China are particularly prominent due to their historically high contribution to the pool of skilled labor employed by firms prior to the tightening of visa availability. In contrast, Canadian workers are frequently hired owing to Canada's geographic proximity to the United States and its comparatively lenient high-skilled immigration policies. A notable example cited in the study is Microsoft's increasing relocation of operations to Vancouver, Canada—located approximately three hours from its Seattle headquarters. Importantly, U.S.-based multinational corporations (MNCs) appear to have significantly increased both the volume and proportion of their operations in these three countries.[7]

H-1B workers contribute significantly to innovation and economic growth. A 2019 study found that higher H-1B approval rates were linked to increased patent filings, venture capital funding, and successful startups. Contrary to claims that H-1B workers suppress wages, data from 2021 shows their median salary was $108,000 compared to $45,760 for U.S. workers overall. Between 2003 and 2021, H-1B wages grew 52%, outpacing the 39% wage growth for all U.S. workers. Additionally, in FY 2019, 78% of employers paid H-1B workers above the prevailing wage for their roles. Overall, the H-1B program drives economic expansion, fosters innovation, and strengthens U.S. competitiveness in the global market.[6]

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[5] David J. Bier, *Facts About H-4 Visas for Spouses of H-1B Workers*, *Cato Inst*. (Nov. 15, 2019), https://www.cato.org/blog/facts-about-h-4-visas-spouses-h-1b-workers#_edn10.

[6] Am. Immigration Council, *The H-1B Visa Program: A Primer on the Program and Its Impact on the U.S. Economy* (Jan. 3, 2025), https://www.americanimmigrationcouncil.org/sites/default/files/research/25.01.03_h-1b_visa_program_fact_sheet.pdf.

[7] "Restricting Visas for Skilled Workers Leads to Offshoring." *NBER*, www.nber.org/digest/sep20/restricting-visas-skilled-workers-leads-offshoring. Accessed 7 May 2025.

A. Immigration Policies Outside of the US

Canada's highly skilled immigration policies are much easier to navigate. For instance, Canada's Express Entry Program is a two-stage, points-based system for skilled immigration into the country. The program is designed to attract high-skilled workers who meet specific economic and labor market demands. As a centralized gateway, it streamlines applications for high-skilled permanent economic immigration programs. By reducing bureaucracy and shortening wait times, the system prioritizes candidates with qualifications that align with Canada's economic priorities. A major advantage of the Express Entry program is that it does not require employer sponsorship, though applicants can earn additional points for having a job offer from a company in Canada. The program also boasts processing times of 6 to 12 months and an application fee of just over $1,000. In contrast, obtaining employment-based permanent residency in the U.S. upon transitioning from a temporary work visa (such as the H-1B) requires sponsorship by an employer, is subject to country and annual caps, can take up to 84 years in extreme cases, and costs a minimum of $2000.[8]

Additionally, Canada's system allows for more avenues to permanent residency, especially for those with Canadian work experience. As global competition for skilled talent intensifies, Canada has launched a new Tech Talent Strategy aimed at attracting high-skilled immigrants—particularly those in the U.S. on H-1B visas—by offering them and their families open work and study permits. This policy underscores Canada's strategic initiative to leverage structural deficiencies in the United States' immigration framework, which has remained largely unchanged since its last substantive legislative reform in 1990 and is increasingly viewed as ill-equipped to address contemporary labor market and demographic challenges.[9] Moreover, there is no numerical limit on how many work visas can be issued under Canadian immigration law. In contrast, it has become increasingly more difficult to get an H-1B work visa, for example, in March 2021, sponsoring employers filed around 308,000 H-1B applications and over 72% of petitions were rejected. Also, unlike the U.S., Canada also does not have a per-country limit on permanent residence, and immigrant workers are generally able to declare immigrant intent after working in temporary status for one year, regardless of country of origin. Meanwhile, the employment-based green card backlog stood at around 1.4 million in 2021, with applicants from certain countries like India estimated to wait several years to a decade before becoming eligible for a green card.[10] Canada and other countries with streamlined systems for highly skilled workers demonstrate a clear recognition of the critical role such talent plays in driving national development and economic growth.

B. H-4 EAD Program

Despite the well-documented contributions of H-1B visa holders—who not only seek better opportunities for themselves but also drive economic growth in the U.S.—their dependent children on H-4 visas are denied basic rights, including work authorization. It wasn't until 2015

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[8] Sneha Puri, *What the U.S. can learn from Canada's Express Entry Program*, Niskanen Center (Dec. 10, 2024), https://www.niskanencenter.org/what-the-u-s-can-learn-from-canadas-express-entry-program/.

[9] Kate Hooper, J.B. (2025) *Canada's new Tech Talent Strategy takes aim at high-skilled immigrants in the United States*, *migrationpolicy.org*. Available at: https://www.migrationpolicy.org/news/canada-recruitment-us-immigrant-workers (Accessed: 09 May 2025).

[10] Moodie, A. (2025) *U.S. immigration flaws cause ripple effect in Canada*, *Boundless*. Available at: https://www.boundless.com/blog/us-impact-canadian-immigration/ (Accessed: 09 May 2025).

that the Department of Homeland Security (DHS) introduced the H-4 EAD program, allowing spouses of H-1B nonimmigrants with immigrant intent to apply for work authorization through an Employment Authorization Document (EAD).[11] However, children under 21—many of whom are college students—were excluded from this program despite facing similar challenges. This exclusion lacks a rational basis when examined under relevant legal and policy considerations, particularly given that these young adults require work experience to build their careers. Furthermore, since H-4 dependents are ineligible for federal or state financial aid, their inability to work creates additional financial hardship, limiting their educational and professional opportunities.

Additionally, obtaining a green card as an H-1B visa holder, which also includes H-4 dependents, is a complex and lengthy process. The employer must first sponsor the worker for permanent employment, proving to the Department of Labor that no qualified U.S. workers are available for the position and that hiring the foreign worker will not negatively impact wages. Once approved, the employer submits a Form I-140 petition—an employment-based immigrant visa petition that establishes the worker's eligibility for a green card based on their professional qualifications—which must be approved before the H-1B holder can apply for permanent residency. However, even with an approved I-140, many H-1B holders face long waits due to annual limits on employment-based green cards and per-country caps, which create significant backlogs for applicants from certain nations.[12] So, because H–1B nonimmigrants and their families often face long delays in the process of obtaining permanent residence, H-4 children face prolonged uncertainty. This hardship intensifies when they age out at 21, forcing them to either transition to another visa—often with significant restrictions—or leave the U.S. altogether.

Mistreatment and Exploitation of H-4 and H-1B workers

Skilled foreign workers on H-4 visas and on H-1B visas face mistreatment and exploitation as employees. If Congress were to allow children of H-1B nonimmigrants to be included in the H-4 EAD program, they might encounter similar challenges. Given the difficulties currently faced by H-1B holders and their dependents, it is likely that children of H-4 visa holders would experience comparable obstacles. Therefore, simply granting work authorization to H-4 visa holders is not enough. It is crucial to implement additional laws to protect them from mistreatment and exploitation, addressing the challenges that continue to persist.

While the H-4 EAD program has the potential to improve the lives of numerous H-4 dependents, it has also preyed upon their labor and placed them within the context of a racist, exploitative system of skilled immigration into the United States. Both the H-1B and H-4 EAD systems contribute to the exploitation of skilled workers, as they create an environment where workers are subject to mistreatment due to their transient nonimmigrant status.

The H-1B program is criticized for the exploitation of foreign workers due to its temporary nature, the control employers have over workers' immigration status, and wage theft. H-1B workers must maintain H-1B-eligible employment to remain in the U.S., and employers' control over their status leads to vulnerability, as it limits workers' career mobility and freedom.

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[11] Isha Vazirani, *Mistreatment and Exploitation of Skilled Foreign Workers Through H-Visa Precarity*, *74 Hastings L.J.* 583 (2023).

[12] *Washington Alliance of Technology Workers v. U.S. Dep't of Homeland Sec.*, 924 F.3d 957 (D.C. Cir. 2019), https://law.justia.com/cases/federal/appellate-courts/cadc/16-5287/16-5287-2019-11-08.html.

Employers also often misclassify workers on Labor Condition Applications, leading to wage theft. Despite their critical contributions to sectors like healthcare and technology, H-1B workers often face exploitation, including underpaid wages and discrimination, particularly caste-based in Silicon Valley. The temporary nature of the H-1B status discourages workers from complaining about mistreatment for fear of losing their employment and immigration status. This system places H-1B workers at a significant disadvantage, subjecting them to workplace abuses and further exacerbating racial and professional discrimination.

The H-4 EAD was introduced to retain skilled workers in the U.S. and provide financial stability for families, especially those with highly educated individuals. Many H-4 EAD holders are well-qualified, with over 50% holding a master's degree and 48% working in tech. However, the H-4 EAD program also exposes families to personal and professional instability. Since H-4 status is tied to the H-1B holder's employment, the loss of the H-1B holder's job can jeopardize the H-4 dependent ability to remain in the U.S. and work. This system creates precarious conditions for families, especially for those from the Global South, as it ties their immigration status to continuous skilled employment. Even tragic events, such as the 2017 shooting death of an H-1B worker, can leave H-4 dependents vulnerable.[11] After Srinivas Kuchibhotla, an Indian engineer working in Kansas on an H-1B visa, was fatally shot in a hate crime, his wife, Sunayana Dumala—also in the U.S. on a dependent H-4 visa—faced the risk of deportation because her legal status was tied entirely to her husband's visa. Although she had lived in the United States for years and was employed, her dependent H-4 status did not allow her to remain in the country independently, highlighting the fragility and emotional toll of a system that offers little protection to immigrant families in times of crisis.[13] This case underscores not only the emotional trauma faced by immigrant families, but also the systemic instability built into their legal status. Despite the qualifications of many H-4 EAD holders, the system perpetuates instability, as their work authorization is linked to the primary visa holder's status.

The H-4 program has also faced significant legal and administrative challenges since its inception in 2015. In the case *Save Jobs USA v. DHS*, a group of IT workers sued the Department of Homeland Security (DHS), arguing that the rule unfairly increased job competition. Although initially dismissed due to a lack of concrete harm, the case was later revived by the D.C. Circuit Court, allowing the challenge to proceed. The Trump Administration's intent to rescind the H-4 EAD rule further heightened uncertainty, demonstrating the program's vulnerability to political shifts.

Beyond litigation, the Trump Administration imposed restrictive policies targeting H-1B and H-4 visa holders under the "*Buy American and Hire American*" executive order. Although the H-4 EAD rule was never formally revoked, bureaucratic measures—such as ending premium processing, introducing biometric requirements, and increasing processing times—created significant employment gaps for H-4 EAD holders. These delays disproportionately affected women of color from the Global South, exacerbating financial and professional instability for thousands of immigrant families. Several lawsuits sought to counteract these administrative barriers, challenging DHS's slow processing of EAD applications. Cases like *Kolluri v. USCIS* and *Gona v. USCIS* attempted to argue that these delays were unlawful but were ultimately unsuccessful. However, *Shergill v. Mayorkas* resulted in a settlement that ensured automatic extensions of work authorization for H-4, E, and L visa holders, marking a significant legal victory.

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[13] *Killing in Kansas Bar Put Victim's Widow at Risk of Deportation (Published 2017)*, www.nytimes.com/2017/09/13/us/widow-deported-indian-kansas.html. Accessed 7 May 2025.

The ongoing challenges to the H-4 EAD program highlight its structural vulnerability, as it remains an executive regulation rather than a law, making it susceptible to reversals depending on the political climate. The cases such as the *Save Jobs USA v. DHS* exemplifies how anti-immigration groups have weaponized legal challenges to stall or weaken policies benefiting skilled immigrants. Even without outright revoking the H-4 EAD, the Trump Administration effectively restricted its benefits by introducing procedural hurdles that made employment continuity nearly impossible for many visa holders. While litigation has provided some relief, the broader issue remains: the U.S. immigration system ties workers' legal status to employment, limiting their ability to challenge workplace discrimination, wage suppression, or processing delays. The treatment of H-4 visa holders reflects systemic inequities in immigration policy, particularly impacting women, people of color, and college students. The ongoing legal and policy battles over the H-4 EAD rule emphasize the urgent need for comprehensive immigration reform that provides greater security and fairness for skilled immigrant workers and their families so that, down the line, in hopes of a better future, the children of H-1B workers will be able to work and not have to live under a mistreated and exploited system.[11]

Political Parties on Immigration Policies

This pattern of inequity is not limited to H-4 visa holders but reflects a broader systemic failure in U.S. immigration policy. While legally skilled immigrants and their families navigate restrictive regulations and uncertainty, much of the national immigration discourse remains fixated on undocumented immigrants. Republicans have consistently prioritized measures aimed at curbing illegal immigration. A 2022 Pew Research Center survey found that 91% of Republicans and Republican-leaning independents viewed increasing security along the U.S.-Mexico border as an important goal, with 72% considering it very important. Additionally, 79% supported increasing deportations of immigrants currently in the country illegally. On the other side, Democrats have generally advocated for providing pathways to legal status for undocumented immigrants. The same 2022 Pew Research Center survey revealed that 80% of Democrats and Democratic-leaning independents supported establishing a way for most immigrants currently in the country illegally to stay in the U.S. legally.[14] In any case, both parties have remained fixated on the issue of illegal immigration.

A. Republicans

Republicans' fixation on illegal immigration has not only dominated the national conversation but has also coincided with their support for stricter immigration controls and more restrictive visa policies — including those related to H-1B (temporary skilled workers) and H-4 (dependents of H-1B holders) visas. While not every Republican lawmaker holds identical views, several key policies, administrative decisions, and legislative efforts have either hindered or worsened the situation for H-1B/H-4 visa holders in the past. Under Trump's first presidential term, the Trump administration implemented a series of restrictive immigration policies, affecting the H-1B visa program significantly. Under the "Buy American, Hire American" executive order, H-1B visa applications faced increased scrutiny, leading to rise in denial rates, peaking at 24% in 2018 and 21% in 2019. However, due to a legal settlement compelling U.S.

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[14] Oliphant, J.B. (2022) *Republicans and Democrats have different top priorities for U.S. immigration policy*, *Pew Research Center*. Available at: https://www.pewresearch.org/short-reads/2022/09/08/republicans-and-democrats-have-different-top-priorities-for-u-s-immigration-policy/?utm_source=chatgpt.com (Accessed: 09 May 2025).

Citizenship and Immigration Services (USCIS) to cease certain practices, this rate plummeted to 2% by FY 2022. Additionally, there was a surge in Requests for Evidence (RFEs) and visa denials, making it increasingly difficult for applicants to secure approvals and hence forced many international professionals to depart the U.S.[15]

Moreover, the Trump administration may seek to revive the 2020 H-1B interim final rule under Trump's current term, originally halted due to procedural flaws. Both the Trump and Biden administrations supported stricter definitions of specialty occupations, requiring a U.S. bachelor's degree or higher in a directly related field. Trump's policies emphasized narrow interpretations of specialty occupations and employer-employee relationships, especially targeting H-1B workers at third-party sites. The Department of Homeland Security even proposed limiting H-1B approvals to one year for such placements and redefining the employer to include client companies, potentially deterring them from hiring H-1B professionals. In addition, the Trump-era Department of Labor implemented a rule in October 2020 that significantly raised the minimum wage for H-1B positions, effectively pricing many visa holders out of the market. For example, employers in San Jose would be required to pay Level 4 electrical engineers 53% above the market wage, and 54% more even at Level 1. These tightened regulations could lead to unintended consequences, such as increased offshoring. Research by Wharton professor Britta Glennon found that when U.S. firms are denied H-1B workers, they often move operations and talent abroad, undermining U.S. competitiveness in the global economy.[16] The Trump administration's 2025 immigration policy changes, including stricter enforcement and "Buy American, Hire American" policies, are set to increase USCIS processing times across H1B / H4 visa categories. The policies are expected to result in more frequent requests for evidence (RFEs) on employment-based petitions, higher rates of petition denials, stricter rules for evaluating eligibility, reduced deference to previously approved petitions, and increased scrutiny of PERM labor certifications—the first step in many employment-based green card processes.[17]

Legislative inaction or resistance has also hindered meaningful immigration reform, particularly due to a lack of support from many Republican lawmakers. Bipartisan bills aimed at addressing critical issues—such as eliminating green card backlogs that disproportionately affect Indian H-1B workers, increasing visa caps, or streamlining processing—have struggled to gain traction. For instance, proposals like the Fairness for High-Skilled Immigrants Act of 2019 (H.R. 1044) aimed to eliminate per-country caps for employment-based green cards, which would have significantly benefited H-1B visa holders from countries like India facing extensive backlogs, garnered substantial bipartisan support, however, despite this support, the bill faced opposition in the Senate. Senator Mike Lee (R-UT) attempted to pass the Senate version (S. 386) through unanimous consent, but it was blocked by several senators, including Chuck Grassley (R-IA),

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[15] Meghana Guntur, Trump's H-1B visa policy in 2025: What foreign workers and employers need to know Kodem Law (2025), https://kodemlaw.com/non-immigration/trumps-h-1b-visa-policy-in-2025-what-foreign-workers-and-employers-need-to-know/ (Accessed: 16 May 2025).

[16] Last updated: January 17 et al., H-1B visa restrictions: What to expect under a second Trump term VisaVerge (2024), https://www.visaverge.com/news/h-1b-visa-restrictions-what-to-expect-under-a-second-trump-term/ (Accessed: 16 May 2025).

[17] Last updated: February 18 et al., USCIS processing times likely to rise under new Trump administration policies VisaVerge (2025), https://www.visaverge.com/questions/uscis-processing-times-likely-to-rise-under-new-trump-administration-policies/ (Accessed: 16 May 2025).

Rand Paul (R-KY), and Dick Durbin (D-IL), due to concerns about potential negative impacts on diversity and labor protections. Although the Senate eventually passed an amended version of the bill on December 2, 2020, the differences between the House and Senate versions were not reconciled before the end of the 116th Congress, and the bill was not enacted into law.[18]

B. Democrats

On the other side, the Democratic Party and Biden administration consistently advocated for reforms to help legal immigrants like H-1B and H-4 visa holders, especially in campaign platforms and speeches. However, they have not followed through with actual legislation or administrative changes, even during periods of unified government. For example, President Biden's 2021 Immigration Bill ("U.S. Citizenship Act of 2021") proposed for eliminating per-country caps on employment-based green cards, sought to protect dependents of H-1B visa holders, including H-4 visa holders who age out, and advocated for automatic work authorization for H-4 spouses and smoother paths to permanent residency. However, this bill was introduced but never passed in Congress—even when Democrats controlled both chambers in 2021–2022.[19] Moreover, the America's Children Act (2021–2023) to protect "Documented Dreamers" by providing lawful permanent resident status was introduced in 2021 but was never passed into law.[20] This pattern of neglect is not new; it became particularly evident during the Obama administration's rollout of DACA (Deferred Action for Childhood Arrivals), which provided deportation relief and work authorization to undocumented youth, while overlooking the similarly precarious situation of children of highly skilled legal immigrants who had adhered to lawful immigration pathways.[21]

As a result, the challenges faced by legal immigrants—especially H-1B visa holders and their dependents—are often overlooked and, in many cases, exacerbated. The U.S. must extend its focus beyond just undocumented immigrants and address the legal immigration crisis, ensuring that those who follow the rules are not left in a broken system that exploits their status.

Conclusion and Reform

The current policies governing H-4 visa holders—particularly the children of H-1B workers—expose a critical gap in the U.S. immigration system that undermines the very talent it seeks to attract. Despite their qualifications and legal status, these individuals face severe limitations on work authorization and professional development, leading to instability, exploitation, and marginalization. These barriers not only harm their futures but also deprive the U.S. economy of skilled contributions that could enhance innovation and growth.

The exclusion of H-4 dependents from meaningful opportunities reflects a broader systemic failure that contradicts America's stated values of meritocracy and inclusivity. Reform is imperative. Expanding work authorization, facilitating access to professional pathways, and streamlining transitions to permanent residency are essential to unlocking the full potential of this population. A just and equitable immigration framework must address not only the needs of undocumented immigrants but also correct the injustices faced by those who have adhered tol egal processes. Only then can the U.S. maintain its global leadership and uphold its commitment to fairness and opportunity.

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[18] H.R. 1044, 116th Cong. (2019), https://www.congress.gov/bill/116th-congress/house-bill/1044.

[19] U.S. Citizenship Act of 2021 bill summary, National Immigration Forum (2021), https://immigrationforum.org/article/u-s-citizenship-act-of-2021-bill-summary/ (Accessed: 16 May 2025).

[20] H.R. 4331, 117th Cong. (2021), https://www.congress.gov/bill/117th-congress/house-bill/4331.

[21] Nat'l Immigration Forum**,** *Fact Sheet on Deferred Action for Childhood Arrivals (DACA)* (Jan. 19, 2024), https://immigrationforum.org/article/fact-sheet-on-deferred-action-for-childhood-arrivals-daca/.

Article

Greenwashing in Fast Fashion: Legal Loopholes and Corporate Accountability

Sheila Bakhtari, Vineet Josan, Huda Tombul

This paper explores the issue of greenwashing within the context of Environmental, Social, and Governance (ESG) practices, with a particular focus on the fashion retail industry. Greenwashing companies make misleading or false claims about their ESG efforts to appear more sustainable or socially responsible than they are. Over recent years, the prevalence of greenwashing has increased, primarily due to the absence of clear, universal regulations. The lack of standardized definitions or regulatory frameworks—compounded by varying industry norms, product types, and regional laws—has allowed companies to exploit inconsistencies and make unsubstantiated sustainability claims. The growing consumer demand for sustainable products is analyzed alongside the risks posed by misleading environmental claims and their role in undermining consumer trust. Through an analysis of key legal cases, including Commodore v. H&M and Lizima v. H&M, the paper highlights the challenges in holding companies accountable for greenwashing, particularly when regulations remain ambiguous. It also reviews federal and state-level regulatory frameworks in the U.S., such as the Federal Trade Commission's "Green Guides" and California's climate-related disclosure laws, which aim to curb deceptive environmental claims. Despite these efforts, there is an urgent need for more robust regulations to prevent greenwashing and protect consumer interests. To address this issue, regulators must establish a clear, standardized framework for identifying greenwashing and implement uniform guidelines to ensure transparency and accountability in corporate sustainability claims.

I. Introduction

The Environmental, Social, and Governance (ESG) framework entails a set of practices and policies organizations implement to limit negative impacts on the environment and society. [1] A 2023 study by Deloitte revealed that nearly half of global consumers across 23 countries have purchased at least one sustainable product, even amid inflation concerns, underscoring mainstream demand for green products. Additionally, consumers were willing to pay an average premium of 27% for sustainable products when these attributes were clear and reliable. Consumers are particularly motivated by features like renewable or recycled materials, eco-friendly packaging, and transparency about environmental impacts within an organization's standard practices. These initiatives are rapidly growing in importance for customers, pushing companies to adopt more positive and ethical practices.

[1] The Wall Street Journal *Green Products Establish a Foothold in the Consumer Mainstream* (Jun. 21, 2023), https://deloitte.wsj.com/sustainable-business/green-products-establish-a-foothold-in-the-consumer-mainstream-b690af3b.

A. Greenwashing

Many companies have expanded their ESG disclosure either voluntarily or mandatorily due to regulations. However, these disclosures are often tainted by misinterpretations and false claims about ESG practices—a practice known as "greenwashing." [2] Key themes in greenwashing controversies include misleading or inaccurate claims about ESG credentials, incomplete or one-sided stories, flawed science or calculations, misleading labels, and regulatory inaccuracies. These factors highlight how greenwashing disputes often stem from exaggeration or omission of a product's environmental impact. Currently, there is no universal standard for what can be ruled as greenwashing due to differing industries, products, and regional governing standards. Individuals also hold contradictory perspectives, as what seems like a sincere sustainability effort to one person might appear misleading to another. Additionally, while some view greenwashing as purely an environmental issue, others also consider social and governance concerns, broadening the scope to all of ESG. To protect consumers and uphold trust in the market, specific regulations must be made to hold companies accountable. With an increasing number of class-action lawsuits targeting companies for alleged greenwashing, this has become a critical area for regulatory intervention. In response, regulators must establish a clear, standardized framework for identifying greenwashing and implement uniform guidelines to ensure transparency and accountability in corporate sustainability claims.

B. Existing Federal Frameworks

The U.S. lacks federal laws that explicitly address and prohibit greenwashing. Although legal frameworks exist within the Federal Trade Commission (FTC) and the Securities and Exchange Commission (SEC), they are limited in enforcement and are not legally binding. The FTC developed the "Green Guides," which attempted to combat these issues by creating an interpretive tool that applies to all environmental marketing claims and advised marketers on how to qualify their claims to avoid deceiving consumers.[3] The Green Guides can be used to interpret the FTC's enforcement of [4] Section 5 of the FTC Act, which prohibits unfair or deceptive practices. Many states have considered the Green Guides when developing their consumer protection laws and enforcement strategies.

Additionally, the SEC has actively addressed public companies' disclosures about climate-related risks. In 2021, the SEC developed a Climate and ESG Enforcement Task Force to enforce their climate change disclosure guidelines.[5] This signaled a shift towards increased government intervention in the regulation of environmental disclosures. However, in 2024, the task force was disbanded due to challenges concerning industry pushback, legal obstacles, and shifting judicial interpretations that limited the SEC's regulatory authority. Although the Task Force dissolved, the SEC continues to enforce rules such as those on corporate board diversity and climate disclosures.

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[2] Peter Pears, Tim Baines, and Oliver Williams,*Greenwashing: Navigating the Risk*, Harvard Law School Forum on Corporate Governance (Jul. 24, 2023),
https://corpgov.law.harvard.edu/2023/07/24/greenwashing-navigating-the-risk/

[3] Federal Trade Commission,"*Green Guides*",
https://www.ftc.gov/news-events/topics/truth-advertising/green-guides(last updated Oct.11, 2012)

[4] 15 U.S.C. § 45(a) (2018).

[5] Kevin LaCroix, "*SEC Disbands Climate and ESG Task Force*" The D&O Diary (Sep. 2024),
https://www.dandodiary.com/2024/09/articles/esg/sec-disbands-climate-and-esg-task-force/.

On the state government level, California has enacted three climate-focused disclosure laws: [6] the Voluntary Carbon Markets Disclosure Act (AB 1305) which requires detailed reporting on carbon offset claims with violations punishable by up to six months in jail or fines of up to $2,500; [7] the Climate Corporate Data Accountability Act (SB 253) mandating annual greenhouse gas emissions disclosures from companies with total annual revenues over $1 billion; and [8] the Climate-Related Financial Risk Act (SB 261), which requires firms with over $500 million in annual revenue to report climate-related financial risks. Collectively, these laws aim to make climate impact claims more credible and verifiable by replacing voluntary disclosures with mandatory reporting. The federal government should look to adopt similar legislation to ensure consistent standards across the country.

C. Strengthening Regulations

Despite increased regulation, the challenge lies in effectively defining and enforcing greenwashing as companies continue to exploit ambiguities in sustainability claims.[9] Although the number of reported cases has decreased in 2024, the severity of those cases increased, with many companies being repeat offenders in what is referred to as systematic greenwashing. This reveals how enforcement penalties or public backlash have not been severe enough to deter them.

This article will dive into the greatest challenge in regulating greenwashing, which lies in its ambiguous definition and absence of uniform standards, particularly within the retail industry. This lack of clarity enables companies to remain silent about their sustainability practices to evade scrutiny or exploit loopholes to avoid legal repercussions despite misleading consumers. To address this, the United States (U.S.) should enact federal legislation that bans vague environmental claims, mandates third-party audits, and imposes legal accountability through binding penalties and fines.

II. GREENWASHING & FAST-FASHION

D. The Paradox of Sustainable Consumption in the Fast-Fashion Industry

As consumers become more environmentally conscious, brands have responded with marketing strategies that emphasize a greater focus on corporate social responsibility and sustainability efforts. One sector that has focused its marketing campaigns in this direction is the fast fashion industry, where brands have become increasingly eager to showcase their commitment to environmentally friendly practices. This shift highlights an inherent contradiction within fast fashion, a sector whose business model hinges on the rapid overproduction of low-cost clothing by mass-market retailers.[10] These textiles are intended to be discarded after a short period of use, thereby compelling consumers to purchase more products in the future. The

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[6] Cal. Health & Safety Code §§ 44475–44475.3 (West 2024).
[7] S.B. 253, 2023–2024 Reg. Sess., ch. 382 (Cal. 2023).
[8] S.B. 261, 2023–2024 Leg., Reg. Sess., ch. 383 (Cal. 2023).
[9] Lauren Foye, *Greenwashing Declines for the First Time in Six Years, but High-Severity Cases Jump 30% Annually, New Research Claims*, Zero Carbon Academy (Oct. 26, 2023), https://www.zerocarbonacademy.com/posts/greenwashing-declines-for-the-first-time-in-six-years-but-high-severity-cases-jump-30-annually-new-research-claims.
[10] Gian Bonanni, Justine Nolan & Samuel Pryde, *Explainer: What is fast fashion and how can we combat its human rights and environmental impacts?*, Austl. Hum. Rts. Inst. (Apr. 19, 2023), https://www.humanrights.unsw.edu.au/research/commentary/explainer-what-fast-fashion-human-rights-environmental-impacts.

culture of overconsumption fostered by this industry contributes significantly to pollution, carbon emissions, and waste. According to the European Commission, textiles rank as the fourth highest-pressure category for the use of primary raw materials and are the fifth largest contributor to greenhouse gas emissions. Additionally, it is estimated that less than 1% of all textiles worldwide are recycled into new textiles.[11] Despite sustainability-focused messaging, these metrics show that the industry's core practices remain deeply unsustainable.

E. H&M Sustainability Initiatives

One organization that has become particularly vocal in its efforts to combat these environmental challenges is H&M. H&M, which stands for Hennes & Mauritz AB, is a Swedish international firm founded by Erling Persson in 1974. Since then, it has grown into one of the largest fast-fashion retailers in the world and is currently the second-largest clothing retailer globally, with operations spanning 74 countries and more than 5,000 stores worldwide.[12] After facing significant criticism regarding its ethical practices and allegations of human rights violations that cast doubt on its intentions, H&M launched one of its most ambitious sustainability initiatives in 2010. This initiative, known as the Conscious Collection, featured a line of women's clothing made exclusively from environmentally responsible materials. In 2011, H&M partnered with Sustainable Apparel Coalition (SAC), whose goal is to encourage sustainability and corporate transparency in the apparel industry.[13] In 2012, the H&M Group established the H&M Foundation, an initiative funded by the Persson family to support the textile industry in halving its greenhouse gas emissions every decade by 2050. These efforts continued in the following years with their #HMConscious and Circular Fashion campaigns in 2016-2018. However, despite their seemingly well-intentioned efforts and advertised goals, H&M provided little transparency regarding their manufacturing process. In August 2019, the Norwegian Consumer Authority (CA) issued a statement accusing H&M of providing insufficient and unclear information regarding the level of sustainability of its Conscious Collection.[14] CA director, Elisabeth Lier Haugseth, warned consumers that they may be being misled by "greenwashing" statements featured in the companies' marketing strategies. Haugseth argued that the fashion retailer makes broad assertions in its marketing regarding the "sustainable" features of its products. These assertions by H&M in their marketing and branding have since exposed the company to multiple litigation matters as well as public scrutiny.

F. Commodore v. H&M

While the earliest explicit accusation of H&M greenwashing dates back to 2019, it wasn't until 2022 that legal action was taken. On July 22, 2022, New York state resident Chelsea Commodore filed a class action lawsuit against H&M, alleging that H&M's labeling, marketing, and advertising are designed to mislead consumers regarding their products' environmental attributes.[15] The case marked a pivotal moment in the legal scrutiny of retail sustainability

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[11] *European Commission, A New Circular Economy Action Plan, COM (2020) 98 final, at 10 (Nov. 3, 2020),* https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020DC0098

[12] H&M Group, Annual Report 2020, page #6, 2020. https://hmgroup.com/wp-content/uploads/2021/04/HM-Annual-Report-2020.pdf

[13] Sustainable Apparel Coalition, SAC Membership, https://apparelcoalition.org/ (last visited Oct. 15, 2024)

[14] H&M Case Shows How Greenwashing Breaks Brand Promise, https://www.forbes.com/sites/retailwire/2022/07/13/hm-case-shows-how-greenwashing-breaks-brand-promise/ (last visited Nov. 16, 2024).

[15] Chelsea Commodore v. H&M, No. 22-cv-06360 (S.D.N.Y. 2022)

claims, drawing national attention to how fashion companies communicate their environmental commitments. It also signaled a shift in consumer expectations, with increasing demand for transparency and accountability in corporate sustainability messaging.

G. H&M's Sustainability Profiles

The lawsuit against H&M specifically addressed the company's "Sustainability Profiles," which were intended to inform consumers about the environmental aspects of their products. These profiles were prominently displayed on H&M's website and product listings, suggesting that the company was committed to transparency regarding sustainability. However, an investigation by Quartz on June 28, 2022, raised serious concerns about the accuracy of these profiles.[16] The findings revealed that many of the claims made in these Sustainability Profiles were not only misleading, but in some cases, outright false. For example, one profile claimed that a specific dress was produced using 20% less water than comparable garments. In reality, the data indicated that this dress consumed 20% more water during its production process. Quartz further found that a majority of the products are no more sustainable than items in the main collection, which themselves lack sustainability. Following the publication of Quartz's findings, H&M removed all environmental scorecards from its website. A trade group formed by H&M and other major apparel companies also announced it would pause the public release of scorecard data while it reviewed its methodology. The group stated this move was in response to an additional statement from the Norwegian Consumer Authority that questioned sustainability claims made by H&M and other apparel firms that relied on the same data as the scorecards.

H. Recycled Polyester in H&M's Conscious Collection

The Commodore lawsuit contends that H&M's representations of its products as "conscious" or made from "sustainable materials" in its Conscious Collection were misleading. According to the H&M website, the clothing's material is "at least 50% sustainable materials, such as organic cotton and recycled polyester." However, this claim includes products made of indisputably unsustainable materials, like polyester.

According to the Textile Exchange, a global nonprofit, polyester made up 54% of total global fiber production in 2022 and is one of the most widely produced fibers. Despite its prevalent use, polyester production and disposal raise significant environmental concerns. Polyester is derived from petroleum, a nonrenewable fossil fuel that contributes to greenhouse gas emissions. The process of converting crude oil into petrochemicals releases harmful toxins into the atmosphere, posing risks to both human health and the environment. Although many types of polyester are produced globally, the most commonly used in clothing manufacturing is polyethylene terephthalate (PET). H&M touts a recyclability program with bins in stores in which consumers can leave their old clothing to be recycled for future use. However, I: Collect, the company that handles the donations for H&M, indicates that only 35 percent of what it collects is recycled and used for products like carpet padding, painters' clothes, or insulation. Thus, many of the products end up in second-hand clothing markets and landfills. PET is not biodegradable, leading to long-lasting environmental pollution. Additionally, according to the Changing Markets Foundation, a T-shirt in recycled polyester "can never be recycled again" as the process of turning plastic bottles into clothing significantly degrades the fibers, meaning once made into a textile, it's difficult to break down and reuse for new clothing. This explains why the

[16] *H&M Sustainability Claims Found to Be Misleading*, Quartz, https://qz.com/2022/06/hm-sustainability-profile-claims-misleading (last visited Nov. 10, 2024).

indicated 35 percent of what H&M collects from consumer donations is not typically used towards creating additional clothing.

I. Long-Term Impact on H&M Sustainability Marketing

Commodore sought to recover the actual damages she incurred after purchasing two articles of clothing from H&M's now-defunct clothing line. However, in 2023, she voluntarily dropped the false advertising lawsuit against H&M. This prevents Commodore from re-litigating the same subject matter in the future. While the case was dropped by the plaintiff, the months that followed its filing proved to have a significant impact on H&M. The Conscious Collection that was alleged to have misled customers has been discontinued since 2022 after the Netherlands Authority for Consumers and Markets (AMC) found that H&M was making misleading sustainability claims and required the company to take action. In response, the retail chain made commitments to the ACM, promising to adjust or no longer use sustainability claims on their clothes and/or websites. In addition, H&M agreed to donate 500,000 euros to different sustainable causes to compensate for their use of unclear and insufficiently substantiated sustainability claims. ACM, in return, agreed not to impose any sanctions.[17] Additionally, the "Sustainability Profiles" have not returned to the H&M website. Although the lawsuit itself did not result in a legal ruling, the case and subsequent regulatory action abroad underscore the consequences of fragmented oversight. This case underscores the consequences of regulatory gaps in defining and enforcing green marketing standards: in the absence of clear federal guidelines, it fell to an individual consumer to initiate litigation under general consumer protection laws.

J. Lizima v. H&M

Before the *Commodore v. H&M* case ended, the retailer faced further scrutiny from consumers in the form of another lawsuit, *Lizima v. H&M*, filed in 2023. This new class action suit, brought forth by Abraham Lizama, echoed many of the claims made in *Commodore v. H&M* but introduced additional allegations focused on the ongoing deceptive practices surrounding the company's marketing of "sustainable" clothing lines. H&M filed a motion to dismiss Lizama's complaint, arguing that his claims failed to state a valid cause of action under FRCP Rule 12(b)(6).[18] Specifically, H&M contended that Lizama had not sufficiently alleged a misrepresentation of fact to support his claims of fraud and consumer deception under the Missouri Merchandising Practices Act (MMPA)[19] and common law. H&M also argued that the complaint did not meet the heightened pleading standards for fraud under Rule 9(b),[20] as it lacked the necessary detail about the alleged fraud. Additionally, H&M asserted that it never falsely claimed its products were 'environmentally friendly' or entirely made from sustainable materials, stating that its Conscious Choice collection was marketed with qualified language consistent with the FTC's Green Guides.[21] The court supported this argument, finding that

[17] Netherlands Authority for Consumers and Markets (ACM), Press Release on H&M Sustainability Claims, https://www.acm.nl/en/publications/acm-acts-against-hm-greenwashing

[18] Fed. R. Civ. P. 12(b)(6). (permitting dismissal of a complaint for failure to state a claim upon which relief can be granted).

[19] Mo. Rev. Stat. § 407.020 (2023). (prohibiting deceptive trade practices and fraudulent consumer transactions).

[20] Fed. R. Civ. P. 9(b). (requiring that allegations of fraud be stated with particularity, including the "who, what, when, where, and how" of the fraudulent conduct)

[21] *Green Guides: The Guidelines for Environmental Marketing Claims*, F.T.C., https://www.ftc.gov/news-events/press-releases/2012/10/ftc-issues-revised-green-guides (last visited Oct. 20, 2024)

H&M's claims were sufficiently qualified by noting that the Conscious Choice items contained "more sustainable materials" and were made with "a little extra consideration for the planet." This decision reinforced the challenges that plaintiffs face in proving fraudulent claims under current standards governing fraud allegations, particularly in the context of sustainability marketing.

K. Ellis v. Nike

This dismissal of the *Lizima v. H&M* case appears to have established a critical precedent for future greenwashing lawsuits, effectively providing greater protection for companies accused of misleading environmental claims. In 2024, only a year after the decision for the *Lizima v H&M* case was decided, *Ellis v Nike*[22] was brought to the spotlight when the American manufacturing company, Nike, was sued for falsely advertising their products as sustainable. Nike, Inc., a global leader in athletic footwear, apparel, and equipment, had come out with a new line of products, which were referred to as "the Sustainability Collection," which included clothing made from recycled fibers to reduce waste and lessen Nike's carbon footprint, overall creating more sustainable clothing.

The plaintiff, Maria Guadalupe Ellis, came forward alleging that Nike misrepresented the materials they used to make items for their Sustainable Collection. While Nike advertised the line as incorporating recycled and organic materials, Ellis contends that, in reality, many of the products were made with virgin synthetic and non-organic materials. Virgin synthetic is made from fossil-based resources and is usually combined with other materials, which makes it difficult to recycle.[23] Based on these representations, Ellis purchased three items from the collection, relying on product labels, marketing materials, and advertisements to inform her purchasing decisions. However, despite her claims, she failed to provide any concrete evidence to substantiate the specific advertisements, marketing messages, or product labels that allegedly influenced her purchases. Furthermore, Ellis asserted that, had she known the actual materials used in the products, she would not have paid the price she did for them. However, she did not specify the price she paid for the three items, leaving her claim of financial harm unsubstantiated. This lack of detail raised questions about the credibility of her allegations, particularly since she was unable to provide sufficient documentation to prove that the marketing or labeling was misleading. As a result, the case hinged on whether the mere presence of potentially misleading marketing was enough to justify her claim.

In the end, the case was dismissed in the Federal Court of Missouri. In the final decision statement, the Court stated that there was no way for Plaintiff to know that the materials used by Nike were not made from recycled or organic fibers, and she could not have known whether or not the materials listed - such as polyester and spandex - were not derived from organic or recycled materials. Additionally, it would have been both impractical and unreasonable to attempt to prove that all 2,028 products in the Sustainable Collection were not made from organic or recycled materials. Ellis also failed to demonstrate that she acted as a reasonable consumer under the circumstances, which was crucial to establishing a valid claim. Specifically, she did not provide sufficient evidence to show that a reasonable consumer would have been misled by Nike's marketing and labeling practices. As a result, she was unable to prove that the transaction led to measurable damages that could be calculated with enough certainty. The court, referencing the *Lizima v. H&M* case, applied the "reasonable consumer" standard and concluded

[22] Ellis v. Nike U.S., Inc., 4:23-cv-00632-MTS (E.D. Mo. Mar. 28, 2024)
[23] Textile Exchange, "*Other Synthetics*", https://textileexchange.org/other-synthetics/ (last visited Oct.27, 2024).

that Ellis had not shown that a typical consumer would have been deceived. Because of this, the court granted the motion to dismiss the case.

III. Legal Barriers and the Need for Stronger Regulatory Frameworks

L. Creation of the "Loophole"

The dismissal of the *Ellis v. Nike* case, similar to the *Lizima v. H&M* case before it, reveals a troubling pattern in the growing number of greenwashing lawsuits: the difficulty of holding companies accountable for misleading sustainability claims. More broadly, these cases point to a systemic issue–a "loophole" that companies can exploit to avoid legal repercussions for making exaggerated or misleading claims about their environmental efforts.

A key issue in Ellis v. Nike is the difficulty consumers encounter in gathering sufficient evidence to support their allegations. In this case, the lack of transparency within corporations leaves plaintiffs without access to critical data, such as the precise materials used in a product's production. Without this information, it becomes almost impossible for consumers to prove that a company's environmental claims are either misleading or false. Moreover, even when companies do make sustainability claims, they often accompany them with vague disclaimers or fine print, further complicating the ability of consumers to challenge them. As a result, consumers are left at the mercy of the companies themselves—or third-party researchers with the resources to investigate the accuracy of these claims. This disparity in access to information creates a significant barrier for consumers hoping to hold companies accountable for misleading green marketing.

Another major obstacle is the absence of clear, consistent guidelines governing environmental marketing. While there are some standards in place, such as the Federal Trade Commission's (FTC) Green Guides, these rules are often vague and open to interpretation. For example, terms like "sustainable" or "green" are frequently used by companies without clearly defining what they mean. As a result, consumers are left to question what exactly constitutes a "sustainable" product, and companies can exploit this ambiguity to make unsubstantiated claims. This legal gray area is a loophole that corporations can exploit to avoid accountability, as it becomes exceedingly difficult to prove whether a claim is misleading when the criteria for such terms are so ill-defined.

One of the most important areas for reform is the "reasonable consumer" test, which is used in consumer protection law to determine whether a company's advertising or labeling is deceptive or misleading. Under the current standard, plaintiffs must demonstrate that a typical consumer would have been misled by the marketing practices in question. This is a high bar to clear and often fails to account for the complexities of consumer behavior in an era when environmental claims are ubiquitous. A more flexible, context-driven interpretation of this test could allow consumers to more easily challenge misleading claims.

Moreover, lawmakers must take a more active role in addressing greenwashing and ensuring that companies are held accountable. Currently, many lawsuits are dismissed due to technicalities or insufficient evidence, allowing companies to continue making misleading environmental claims without facing consequences. This perpetuates a systemic loophole that corporations can exploit to avoid legal responsibility while leaving consumers unprotected. Lawmakers should raise the threshold for dismissing such cases, ensuring that plaintiffs are afforded a fair opportunity to present their evidence and challenge deceptive marketing practices.

By doing so, the judicial system would send a clear message that companies must be transparent and truthful in their environmental claims.

This issue is not confined to the United States. Other jurisdictions, such as the European Union, have already taken significant steps to combat greenwashing. On March 26, 2024, the EU's Directive on Empowering Consumers for the Green Transition went into effect, aiming to curb misleading environmental claims by mandating that environmental claims must be based on primary information and that they are verified by a third-party accredited body that must assess and approve the claim. The claim is then subject to a verification process five years after being published. The directive also restricts the use of sustainability labels that are not based on established certification schemes. Additionally, the European Parliament is working on the Green Claims Directive, which will further regulate the language companies can use when promoting environmental benefits. These two pieces of legislation reflect the EU's concerted effort to ensure that environmental claims are clear, substantiated, and free from deception. The contrast between the EU's proactive approach and the more passive stance taken by U.S. regulators underscores the need for stronger consumer protections here. While European consumers benefit from clear regulations and robust enforcement, U.S. consumers still lack the tools needed to effectively challenge corporate greenwashing.

M. Smith v. Keurig

Other cases in the United States may serve as precedents for forcing companies to take some type of responsibility for greenwashing. The best example is *Smith v Keurig Green Mountain Inc.*, where Keurig was faced with a lawsuit after a consumer alleged that Keurig had falsely advertised their K-Cups as recyclable, despite most communities not accepting K-Cups as recyclable.[24] This false advertisement on behalf of Keurig went against several California laws, such as the California Consumer Legal Remedies Act, which prevents companies from misrepresenting products and making misleading claims about their products. The Remedies Act can serve as a prototype for other laws to prevent greenwashing. This could provide an opportunity to establish more specific and stringent laws regarding greenwashing, clearly defining what constitutes "misleading" marketing and preventing companies like H&M from exploiting legal ambiguities to avoid accountability for greenwashing. Keurig agreed to settle and was able to avoid a more severe penalty by refusing to acknowledge any misleading advertisements on their part, and by correcting K-Cup packaging stating that they are "not recycled in all communities." Consumers who were able to prove that they had purchased K-Cups between 2016 and 2022 were eligible for cash payments. While this may not be the ideal outcome, it represents a significant step toward holding companies accountable for their greenwashing practices. Being able to force companies to fix potentially misleading comments they have previously made might set the stage for other companies who have been accused of greenwashing to do something similar.

N. Conclusion

While companies manage to have greenwashing lawsuits dismissed and avoid penalties under current legal frameworks, these cases still play a crucial role in bringing the issue to public attention. Even when plaintiffs do not win, these cases highlight the prevalence of misleading sustainability claims and force companies to confront the gap between their marketing and actual

[24]Smith v. Keurig Green Mountain, Inc., 393 F.Supp.3d 837 (June 28, 2019)

environmental practices. This increased visibility helps raise awareness among consumers, who may become more critical of corporate claims and demand greater transparency.

As public scrutiny grows, companies may be incentivized to move beyond superficial environmental claims and adopt more substantiated, verifiable sustainability practices. The pressure to align marketing with actual environmental impact could drive meaningful changes, not only in consumer purchasing behavior but also in the way companies approach their environmental responsibilities. In this way, while legal outcomes may not always bring direct consequences, these lawsuits serve as an important catalyst for holding companies accountable. They keep the issue of greenwashing in the public eye, pushing businesses toward more honest, transparent practices in response to consumer demand and growing regulatory scrutiny.

Clear guidelines, enforcement through civil penalties, and third-party verification of data-backed claims would hold companies accountable and incentivize businesses to adopt more honest and transparent marketing practices. Additionally, if companies were subject to severe legal consequences for overstating the environmental benefits of their products, including injunctions to cease misleading advertising and mandates to correct public misrepresentations, it would create a strong deterrent against greenwashing. The U.S. should look to implement regulations following existing frameworks created by leaders in combating greenwashing like the European Union, the United Kingdom, and France. In turn, this would encourage a marketplace where sustainability is truly prioritized, and consumers can make informed decisions based on reliable and accurate information. At present, the absence of clear standards and accountability creates a significant gap in consumer protection. However, with stronger regulatory frameworks and more robust judicial support, there is the potential for real change in the fight against greenwashing.

Article

An Analysis of the Legality, Effectiveness, and Humanitarian Impacts of Economic Sanctions in International Law: A Move for Justice or Collective Punishment?

Khola Rathore

This paper critically examines the use of economic sanctions through the lens of international law, human rights, and geopolitical efficacy. It explores the legal frameworks governing sanctions, particularly the UN Charter and international humanitarian law, and interrogates the tension between sanctions as instruments of justice and their potential to constitute collective punishment. Through case studies including Iraq, Iran, South Africa, Sudan, and Venezuela, the paper highlights the humanitarian impact of sanctions on civilian populations and their often limited success in achieving stated political objectives. It argues that sanctions disproportionately affect vulnerable populations while allowing political elites to remain insulated, raising serious ethical and legal concerns. The analysis demonstrates that existing legal frameworks offer insufficient accountability mechanisms, particularly in the context of unilateral sanctions. The paper concludes by advocating for a more principled and transparent international sanctions regime that prioritizes human welfare, respects sovereignty, and aligns with evolving norms of international law.

Introduction

Economic sanctions have been a central pillar of international diplomacy for decades, and they are used by countries and multilateral groups to pressure other countries to change their behavior without direct military action. Defined broadly, sanctions are the measures, typically prohibitions, taken against a target nation, entity, or individual to influence that target's behavior, enforce established international norms, or punish violations of law.[1] This is usually done through trade embargoes, freezing financial assets, travel bans, and hindering economic transactions.[2] Sanctions have often been presented as a necessary mechanism to uphold international law and human rights. Advocates say it is a non-violent means to curb aggression, seek accountability, and deter further violations.[3] But critics argue that those measures very often have devastating humanitarian effects, bearing down disproportionately on civilians while not significantly altering the calculus of political elites.

Economic sanctions, commonly used instruments of global diplomacy and pressure, regularly fail to achieve their policy objectives and can in fact further harm the suffering population they intend to help. Instead of nurturing political change or delivering justice, sanctions often escalate civilian hardship, prolong humanitarian emergencies and entrench authoritarianism. An analysis of their legality, political context, and morality points to the imperative to rethink sanctions as punitive policy that hurt the people it purports to protect.

Legal Framework of Economic Sanctions

A. Legitimation of Economic Sanctions

Legal basis of economic sanctions Sanctions are imposed based on a range of legal instruments, such as international treaties, customary international law or decisions of the UNSC. The UNSC is the sole authority to be able to make binding sanctions under international law, as also confirmed by the ICJ and codified in practice by states. Still, in order to be considered legitimate, sanctions must adhere to core precepts of international law, such as the prohibition on collective punishment and the duty to uphold human rights and humanitarian standards. Sanctions that fail to meet these standards risk undermining their legitimacy and effectiveness.[4]

B. United Nations Charter and Security Council Authority

Multilateral sanctions are primarily governed by the United Nations Charter (1945). Chapter VII of the U.N. Charter gives the UNSC the right to impose sanctions to restore international peace and security.[5] Article 41 affirms a role for non-military enforcement measures, providing that: "The Security Council may determine what measures not involving the use of armed force are to be employed to give effect to its decisions, and may call upon the Members of the United Nations to apply such measures."[6] It was this provision that led to many UNSC sanctions, including those on apartheid South Africa, Iraq, North Korea, and Iran.[7] Although these sanctions are compulsory for all U.N. member states, their efficacy and fairness

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[1] *U.N. Charter art. 41.*

[2] International Emergency Economic Powers Act, 50 U.S.C. §§ 1701-1707 (2018).

[3] Global Magnitsky Human Rights Accountability Act, Pub. L. No. 114-328, § 1261, 130 Stat. 2000 (2016).

[4] International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law,* U.N. Doc. A/CN.4/L.682, at 230–32 (2006).

[5] *Universal Declaration of Human Rights*, G.A. Res. 217 (III), U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

[6] *U.N. Charter art. 41.*

[7] *Protocol Additional to the Geneva Conventions of* 12 August 1949*, and Relating to the Protection of Victims of International Armed Conflicts art.* 33, June 8, 1977, 1125 U.N.T.S. 3.

are widely debated. Critics claim UNSC sanctions often lack due process protections, disproportionately injure civilians, and can be manipulated for political ends.[8]

C. Unilateral Sanctions and Concerns about Sovereignty

Unlike U.N. sanctions, unilateral sanctions targeting individual states or regional blocs are contentious. The United States, EU, and other principal powers often resort to unilateral sanctions based on domestic statutes such as the International Emergency Economic Powers Act (IEEPA)[9] and the Global Magnitsky Human Rights Accountability Act.[10] Such laws allow governments to freeze assets, minimize trade, or ban financial transactions with sanctioned entities. Unilateral sanctions, however, generally contravene international legal principles, notably the prohibition against interference in the sovereignty of states, as enshrined in the U.N. Charter.[11] Unilateral sanctions are argued to violate the principle of non-intervention and may amount to economic coercion, potentially conflicting with customary international law.

The ICJ has also spoken on this in cases such as Nicaragua v. United States[12] relying on a few points. The court held the US to have violated the sovereignty of a fellow state by arming the Contras in Nicaragua and by putting economic sanctions on them, reinforcing the non-interventionist premise of international law that lies at the heart of the case. The ICJ identified economic pressure and support to military efforts as uses of force and as such, would be a prohibited use of force under international law as these actions were intended to force Nicaragua to change its policies through coercion. The ruling was based on existing rules of international law, including those contained in the United Nations Charter, which bans the threat or use of force against the territorial integrity or political independence of any state. Violations of the principles mentioned could also be caused by unilateral sanctions that are applied to put pressure on a State. The ICJ also based itself on evidence adduced by Nicaragua, such as the witness statements and documents that showed the scale of U.S. intervention in favour of opposition forces and the effect on Nicaragua's economy and stability of its unilateral economic sanctions. The Cold War type-dynamics in which the Court was operating also informed its understanding of the U.S. military commitment in the region, such commitment being seen as a necessary component of a strategy to counterbalance a perceived communist threat emanating from Central America. But, the Court also ruled that these geopolitical concerns could not justify breaches of international law. At the end of the day, the ICJ's judgment emphasized the sovereign equality of states, and the necessity of obliging by the principle of non-coercion in international relations; but also the idea that states have an obligation to put out lawless disputes with peaceful means and by respecting the international legal standard, even when they are involved in geopolitical rivalries.

D. International Human Rights Law and Collective Punishment

Sanctions cause grave humanitarian impacts and can breach international human rights law. The right to food, healthcare, economic prosperity, and security for the people is emphasized through the Universal Declaration of Human Rights (UDHR)[13] and the International Covenant on Economic, Social, and Cultural Rights (ICESCR).[14] Sanctions raising concern under these human

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[8] Comm. on Econ., Soc. & Cultural Rts., General Comment No. 8: The Relationship Between Economic Sanctions and Respect for Economic, Social and Cultural Rights, 1, U.N. Doc. E/C.12/1997/8 (Dec. 12, 1997).
[9] International Emergency Economic Powers Act, 50 U.S.C. §§ 1701-1707 (2018).
[10] Global Magnitsky Human Rights Accountability Act, Pub. L. No. 114-328, § 1261, 130 Stat. 2000 (2016).
[11] *U.N. Charter art.* 2, 7.
[12] *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27).
[13] *Universal Declaration of Human Rights, G.A. Res. 217* (III), U.N. Doc. A/RES/217(III) (Dec. 10, 1948).
[14] *International Covenant on Economic, Social and Cultural Rights art*. 11, Dec. 16, 1966, 993 U.N.T.S. 3.

rights frameworks are those that result in food and medical shortages or economic collapse, inducing widespread starvation. Another essential legal factor is the principle of proportionality and necessity, which also applies to sanctions. Under the Geneva Conventions and Additional Protocols, collective punishment measures that cause broad harm to civilian populations are banned.[15] The U.N. The Committee on Economic, Social and Cultural Rights has explicitly stated that sanctions which deny affected populations access to essential goods and services are unacceptable.

The Evolution of Economic Sanctions

Economic sanctions are practical measures in international relations that advance the political goal of attempting to change the behavior of a state without the ultimate resort to war. Where sanctions of the past were more defined–including conquest of territories and nuclear development–they have increasingly morphed into sanctions with broader objectives, like human rights and other international norms. The record of sanctions, whether as a tool of justice or as a form of collective punishment, had its own trajectory. That trajectory was inextricably tied to the shifting contours of international law, diplomacy, and the global system, one whose moral ambiguity proved to be its greatest asset.

A. Establishment of Economic Sanctions

Economic sanctions are hardly a novel concept, even if their modern manifestation arose only in the 20th century. Economic pressure was utilized as one of the first tools of international diplomacy in the 1920s via the League of Nations.[16] In the aftermath of World War I, the League sought to prevent new aggressions by nations with collective action. In 1935, the League imposed economic sanctions on Italy after it invaded Ethiopia. These sanctions are, in practice, perceived as devoid of teeth; world powers (including the United Kingdom and France) refused to enforce them strictly, exposing the struggles of multilateral enforcement sans a strong international consensus.

The Cold War is said to have significantly influenced the development of economic sanctions as a tool of political coercion. It happened because the post-World War II international order was one of bipolarity dominated by two superpowers: the United States and the Soviet Union. Sanctions were employed as a diplomatic tool to exert pressure and served as instruments in broader ideological warfare between capitalist and communist systems. The United States government's economic embargo on Cuba is arguably the most emblematic success of Cold War sanctions; it was implemented in 1960 after the Cuban Revolution and the nationalization of American-owned businesses. Its provisions were meant to punish the Cuban government for siding with the Soviet Union and for espousing policies that were seen as beacons of threat to U.S. interests in the Western Hemisphere.

The Cuban sanctions have been around for generations, but their enforcement has been inconsistent and their impact has fallen disproportionately on the Cuban population. This is an example of how sanctions, even those targeted at a regime's leaders, can lead to unintended humanitarian impacts on the wider population. Another landmark episode in sanctions history during the Cold War was comprehensive economic sanctions against South Africa in the 1980s. They were part of a global campaign to end apartheid and were viewed as a simple and effective case of sanctions being used as a mechanism for justice. International analysis of sanctions,

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[15] *Protocol Additional to the Geneva Conventions of* 12 August 1949, *and Relating to the Protection of Victims of International Armed Conflicts art*. 51(5)(b), June 8, 1977, 1125 U.N.T.S. 3.

[16] *Covenant of the League of Nations art. 1*6, June 28, 1919, 225 U.N.T.S. 188.

including U.N. measures, along with internal resistance in South Africa and global condemnation, contributed to the dismantling of the apartheid system.[17]

The end of the Cold War in the early 1990s brought with it a re-appraisal of sanctions in the post-Cold War world. The disintegration of the Soviet Union ushered in a post–World War II order that transitioned to being more multipolar, and sanctions were treated with increased skepticism and increasingly adopted not solely to reinforce security and political objectives but to promote human rights and justice, too. It was then that sanctions became a principal tool with which to respond to humanitarian crises rooted in genocide, war crimes, and widespread human rights abuses. In the 1990s, however, successful examples, including U.S.-led sanctions in Iraq or the U.N. response to the genocide in Rwanda, began to raise questions about the human costs of sanctions. While sanctions were presented as necessary to pressure governments that commit egregious violations, their sweeping societal impact, especially on civilian populations, became a flashpoint of debate. The Iraq sanctions were particularly criticized for causing immense harm and human suffering without achieving their political objectives.

The Case for Economic Sanctions as a Tool for Justice

When implemented strategically and effectively, economic sanctions can serve as a critical mechanism to enforce international law and facilitate justice, particularly concerning regimes or individuals that infringe on human rights or international peace. The theory is that economic pressure can be a diplomatic tool when war is not desirable, a non-military method to compel countries to comply with international laws and norms. Historically, sanctions have been framed as an apt tool for pursuing justice on the global stage, particularly when seeking to induce democratic reforms, stop human rights violations, or prevent the proliferation of weapons.

South Africa: Getting to the Point of Sanctions Against Apartheid

It was the apartheid case of South Africa that emerged as the preeminent example of sanctions as a pathway to justice. Apartheid, a system that lasted from 1948 to the early 1990s, was a web of institutionalized racial segregation and discrimination, depriving the majority of the Black population of basic human rights and political freedoms. Under the system of apartheid, the South African government, headed by the National Party, codified racial segregation in all sectors of life, including education, employment, neighborhoods, and representation. In response to the crimes of the apartheid regime, a wide international coalition enacted economic sanctions intended to devastate the economy and force the government's hand to end apartheid. Among these were trade embargoes, divestment from South African corporations, arms sales embargoes, and financial embargoes. The United Nations adopted a series of resolutions condemning apartheid, demanding economic sanctions, starting with the arms embargo in 1963 and a total economic boycott in the 1980s. The goal of the sanctions was to isolate South Africa diplomatically and economically and thereby increase the economic and political pressure on the South African apartheid regime to end its discriminatory policies.

Internally, South Africans led by the African National Congress (ANC) resisted, and international advocacy helped to bring down apartheid. However, economic sanctions played a significant role in destroying the system. By the late 1980s and early 1990s, the economic cost of sanctions combined with rising domestic discontent compelled the South African government to negotiate, resulting in the peaceful transfer of power to a democratic government in 1994 under Nelson Mandela. The worldwide sanctions on South Africa are seen as a success story in how economic leverage, if applied with global cooperation, can lead to political reform and to justice.

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[17] S.C. Res. 418 (Nov. 4, 1977).

Sanctions on Iran

U.S.-led sanctions on Iran, especially after the election of President George W. Bush, were viewed as a means of punishing Iran for its nuclear program and promoting international law. For decades, Iran's nuclear ambitions had worried the world. The United States and its allies worried that Iran's nuclear enrichment activities would enable it to build nuclear weapons, which would unsettle the Middle East and ignite a regional arms race. These steps followed a similar series of economic sanctions and measures imposed by the United States, the European Union, and the United Nations to get Iran to stop its nuclear program. These sanctions focused on crucial segments of Iran's economy, such as its oil exports, banking system, and access to international markets. They were meant to shrink Iranian coffers and international presence to compel the Iranian government to negotiate. The sanctions were part of a broader strategy of diplomatic pressure along with gunboat diplomacy to bring Iran in line with international compliance norms on nuclear non-proliferation.

These sanctions, among other factors, contributed to the Joint Comprehensive Plan of Action (JCPOA), or Iran Nuclear Deal, of 2015. Under the deal, Iran was to restrict its nuclear enrichment program and submit to periodic inspections by the International Atomic Energy Agency (IAEA) in return for relief from some sanctions.[18] Although the agreement itself is controversial and the long-term effectiveness continues to be debated, the Iranian case shows how sanctions can be a powerful diplomatic tool to address violations of international norms, especially in nuclear non-proliferation.

Sanctions on Sudan

One of the most meaningful examples of sanctions being used as justice-advancing tools was the establishment of sanctions against Sudan in response to horrific abuses in the country's Darfur region. Between 2003 and 2008, Omar al-Bashir's Sudanese government conducted a violent campaign in Darfur targeting ethnic minorities. The violence, which included widespread killings, sexual violence, and the displacement of millions of people, was labeled a genocide by the United Nations. Due to the human rights abuses, the U.N. Security Council made several sanctions against Sudan.[19] The sanctions included an arms sales ban to the Sudanese government, a travel ban, asset freezes for senior Sudanese officials, and restrictions on Sudanese companies in the military and oil sectors. The aim was to isolate the Sudanese government and force it to stop the violence and move toward peace talks.

The sanctions conveyed that the world would not stand for such acts. To be sure, these sanctions had their critics; there was not a sudden cessation of hostilities, nor was there a return of these individuals to civil society. Together, the sanctions,diplomatic efforts, and the eventual dispatch of a peacekeeping force, helped quell the worst of the violence in Darfur and led the Sudanese government to enter into peace negotiations with the rebels. Though the status of sanctions varies, and while they are not always issued with a positive outcome, they serve to apply additional pressure to rectify human rights abuses and seek a peaceful resolution to flush conflicts.

U.S led sanctions in Iraq

As the 20th anniversary of the U.S.-led invasion of Iraq nears, the reality of life under U.S.-led sanctions has not gone away. The best-known example of this criticism is the U.S.-led sanctions on Iraq in the 1990s. Following Iraq's invasion of Kuwait in 1990, the United States and its allies instituted an extensive sanctions regime, which limited Iraq's ability to sell oil and

[18] S.C. Res. 2231 (July 20, 2015).
[19] S.C. Res. 1591 (Mar. 29, 2005).

reach world markets. The purpose of the sanctions was to compel Saddam Hussein to comply with U.N. Security Council resolutions and to end Iraq's programs of weapons of mass destruction. However, the sanctions came with devastating costs to the civilian population. One in three children died because of malnutrition and lack of medical supplies, and the sanctions led to a deterioration of living conditions, according to a United Nations report, which estimated that more than 500,000 Iraqi children had died. The humanitarian disaster provoked widespread condemnation of the sanctions policy, with one of the prevailing arguments being that the sanctions did not meet the intended political goals and only sought to inflict further suffering on innocent civilians.

Most controversially, former U.S. Secretary of State Madeleine Albright, in a 1996 interview with 60 Minutes, defended the sanctions by claiming that the deaths of hundreds of thousands of Iraqi children were "worth it" to serve the broader strategic course of containing Saddam Hussein.[20] The comment sparked outrage at home and around the world, where critics noted that sanctions represented collective punishment and violated an international norm against targeting civilians during conflict. The prevailing rationale for the Iraq sanctions is, however, one of the clearest showcases of the fact that the imposition of sanctions often backfires, inflicting real harm on the very people it is made to protect.

The question of collective punishment is particularly relevant under international law, which prohibits the targeting of civilian populations in armed conflict. The principle of distinction, one of the fundamental rules of international humanitarian law, requires that fighters and non-fighters be treated differently and that a civilian should not be attacked directly in military operations. Sanctions that punish and harm civilians indiscriminately, like the sanctions against Iraq, violate this principle and contribute to social and economic inequalities already in place.

The Case of Venezuela: A Real-World Illustration of Failed Sanctions

The case of Venezuela offers a concrete example where broad, unilateral sanctions have backfired, causing catastrophic consequences for civilians without meaningfully achieving the political goals they were designed to address. Since 2017, the United States has imposed a sweeping array of economic sanctions against Venezuela, targeting the oil industry, financial institutions, and government officials in an attempt to force President Nicolás Maduro out of power and restore democratic governance.

While these sanctions were framed as tools to weaken the regime and support human rights, they have instead worsened an already dire humanitarian crisis. According to a 2019 report by economists Mark Weisbrot and Jeffrey Sachs, U.S. sanctions contributed to over 40,000 excess deaths between 2017 and 2018 by exacerbating shortages in food, medicine, and medical equipment.[21] The report emphasized that these sanctions were "illegal under international law and devastating to the Venezuelan people." Moreover, United Nations Special Rapporteur Idriss Jazairy criticized the sanctions, stating that "regime change through economic

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[20] 60 Minutes: Madeleine Albright (CBS television broadcast May 12, 1996).

[21] Mark Weisbrot & Jeffrey Sachs, *Economic Sanctions as Collective Punishment: The Case of Venezuela,* (Center for Economic and Policy Research Apr. 2019), available at https://cepr.net/report/economic-sanctions-as-collective-punishment-the-case-of-venezuela/.

measures likely to lead to the denial of basic human rights and possibly starvation is not a lawful means of international relations."[22]

The Case of North Korea

Perhaps the most visible case of sanctions moving into the territory of collective punishment is that of North Korea. An international sanctions regime led by the United States and involving the United Nations as well seeks to prevent the nuclear program from advancing, a consensus on the need to limit proliferation of nuclear arms. But even as these sanctions are intended to pressure the North Korean regime's military strength, ordinary North Koreans nevertheless have had to endure great suffering due the sanctions, and these moves have raised some serious moral questions about whether targeting civilians is justified.

The sanctions have hit one of the world's poorest countries especially hard; North Korea's economy was already in terrible shape, due to decades of mismanagement, isolation and earlier sanctions. Authorities in the country and abroad warn that the economic sanctions have triggered severe shortages of crucial supplies such as food and medicine, deepening the country's already catastrophic humanitarian crisis. The U.N. sanctions that have been imposed on the country have resulted in a humanitarian catastrophe, with millions of people malnourished and without access to fundamental healthcare, according to various human rights organizations.[23]

Sceptics of economic sanctions allege that whilst it is a legitimate practice to target the military capacity of the North Korean leadership, the same sanction measures have inflicted widespread damage, harm on the civilian population. Such "collateral damage" warrants consideration of whether sanctions as a foreign-policy tool are not only immoral, but ineffective. Human rights activists argue that the sanctions not only fail to nudge the regime to change its behavior but to also isolate and impoverish the people of North Korea, who suffer most in times of economic hardship. The sanctions have been characterized as a collective punishment, in which the innocent are made to pay for the crimes of their government [24]. And the whole thing tends to result in a long-term spiral of poverty and need that only makes it harder for the North Korean population to effect change. Without access to international markets and without the inflow of humanitarian goods, the potential for a civil society to develop or for reforms to be rooted within the country is being eroded. Consequently, the sanctions may actually end up strengthening the regime power, instead of weakening it and hence harming the people these are supposed to protect.[25]

Economic Sanctions as a Tool for Collective Punishment

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[22] U.N. Human Rights Office of the High Commissioner*, UN Human Rights Expert Urges to Lift Unilateral Sanctions Against Venezuela* (Feb. 12, 2021), available at https://www.ohchr.org/en/press-releases/2021/02/un-human-rights-expert-urges-lift-unilateral-sanctions-against-venezuela.

[23] Human Rights Watch, *World Report 2024: North Korea* (2024), https://www.hrw.org/world-report/2024/country-chapters/north-korea.

[24] *Amnesty International, North Korea: Starved of Rights (2004), available at https://www.amnesty.org/en/wp-content/uploads/2021/09/asa240032004en.pdf.*

[25] *Korea Peace Network, The Humanitarian Impact of Sanctions on North Korea,* available at https://koreapeacenow.org/resources/the-humanitarian-impact-of-sanctions-on-north-korea

While economic sanctions have the potential to promote justice by pressuring governments to change oppressive or unlawful behavior, they are frequently criticized for their severe humanitarian consequences. Many view them as a form of collective punishment, particularly when they disproportionately affect the general population rather than the political elites or leadership responsible for the targeted policies. Critics argue that sanctions, especially those that are broad, indiscriminate, or poorly designed—often exacerbate poverty, limit access to essential goods and services such as food, medicine, and healthcare, and destabilize economies. As a result, they tend to cause far more suffering among ordinary civilians than among the government officials or entities they are meant to penalize, raising serious ethical and legal concerns under international humanitarian law.[26]

Sanctions, when poorly targeted or broadly applied, often lead to collective punishment, where civilians suffer the consequences of political decisions made by their governments. The U.S.-led sanctions on Iraq in the 1990s, aimed at pressuring Saddam Hussein, caused severe suffering and led to the deaths of hundreds of thousands of children due to malnutrition and lack of medical supplies, without achieving their intended political goals. Similarly, sanctions on North Korea have exacerbated the humanitarian crisis, with the civilian population enduring severe shortages of food, medicine, and healthcare, despite sanctions targeting the regime's nuclear ambitions. In Venezuela, U.S. sanctions have worsened an already dire situation, contributing to thousands of excess deaths without forcing political change. These cases demonstrate that, without strict regulation, sanctions often harm civilians, fail to weaken regimes, and violate international norms regarding the treatment of non-combatants. They highlight the need for sanctions to be more precisely targeted and to take humanitarian consequences into account.

Conclusion

In conclusion, far from being relentlessly justified on the grounds of preserving international order and global norms, economic sanctions involve a complex and ethically demanding range of activities. Illustrative of the devastating humanitarian toll of ill-conceived sanctions are sleepwalking foreign policies like those applied against Iraq, North Korea, and Venezuela that cause mass deprivation, widespread misery, and even help sustain the same regimes that are supposedly intended to be undermined with these sanctions. These are examples of why we need to make sure sanctions are carefully targeted and subjected to rigorous evaluation in relation to their compatibility with international humanitarian law in order to avoid a slide into collective punishment. The United Nations has a critical role to play in encouraging the responsible use of sanctions, serving as a leading player in the global system of sanctions. In principle, the U.N.'s Security Council can still impose sanctions that are rationally related to a particular conflict or offense, in the hope of encouraging respect for international law by causing little harm to the civilian population. But the U.N. sanctions have been unevenly enforced and largely ineffective. The U.N. sanctions imposed on Iraq in the 1990s, which were characterized by wide-reaching and highly damaging humanitarian costs not matched by political ends, are a stark testimony to that. The United Nations' more recent sanctions on North Korea, designed to combat the country's nuclear weapons program, have similarly been criticized for inadvertently hurting ordinary people rather than deterring the regime's military aspirations.

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[26] Comm'n on Human Rights, *Sub-Comm'n on the Promotion and Protection of Human Rights, The Adverse Consequences of Economic Sanctions on the Enjoyment of Human Rights,* U.N. Doc. E/CN.4/Sub.2/2000/33 (June 21, 2000)

To make sanctions more effective and legitimate, the must be sufficiently targeted to hit the relevant entities who are responsible for violating, without unnecessarily put innocent civilians at risk. This might entail "smart sanctions" or "targeted sanctions," those that gear themselves toward individuals and specific sectors tied to the repressive regime, rather than levying them as blanket conditions for an entire population. When administered correctly, these sanctions can make the economic and political resources available to the regime limited, but still bring pressure to bear on those making decisions, rather than the entire population. Furthermore, the U.N. itself could have an important role in monitoring and implementing these more targeted measures, making sure they are calibrated effectively and are being reassessed on a regular basis for their humanitarian impact. A more transparent and accountable structure for the implementation of sanctions could also minimize the collateral damage observed in prior instances. The international community, including organizations like the U.N. and the European Union, must define where and when sanctions can be imposed more clearly. They might involve requiring humanitarian impact assessments and periodic independent oversight to make sure that sanctions are furthering their goal without causing harm that is indefensible under international humanitarian law. The U.N. could similarly undertake measures to improve the coordination of sanctions with diplomatic efforts and operations so that sanctions are part of a more comprehensive, strategic program for long-term peace and stability rather than simply a tool to satisfy short-term political needs.

If we look at past cases, such as European Union sanctions against Russia after Crimea was annexed, or U.N. sanctions against Iran as part of the Joint Comprehensive Plan of Action (JCPOA) or "Iran deal," we can find examples of multilateral and sectoral sanctions that work more effectively than broad economic restrictions. Similarly, these sanctions, together with diplomacy and the prospect of escalation, have resulted in important political changes and increased global cooperation. Yet the successful imposition of such sanctions also depends on a tight binding and discipline among member-states and international bodies which doesn't always exist. The principle of distinction in international humanitarian law is essential to ensure the ethical use of sanctions. The Contrast Principle prohibits the imposition of sanctions which will impair the civilians of belligerent powers, as opposed to injuring or killing them, and which violate customary law. Democratic Republic of the Congo v. Uganda underscores the need to protect civilians and to see that any punitive measures are not only legal but are also proportional.[27] And in the end, sanctions should be thought of as just one in a toolbox of options as part of a larger diplomatic strategy. When constructed carefully and implemented judiciously, they can be a useful instrument to squeeze regimes to adhere to the letter and spirit of international law and human rights norms. But if used irresponsibly, they can create more harm, abuse human rights, and work against the purpose for which these methods are developed. In the future, the international community should aim to craft sanctions in a way that leans more toward the former, where sanctions protect civilians and uphold justice, rather than the latter: They must be applied to not veer into collective punishment but be an equitable and effective diplomatic recourse. With a more principled and transparent approach to sanctions, supported by the power of multilateral collaboration institutions like the U.N. the international community can aim to strike the fine balance between justice, diplomacy and the preservation of human rights.

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[27] *United Nations Security Council, Resolution 1596 (2005), 2, U.N. Doc. S/RES/1596 (Apr. 18, 2005), available at* https://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1596(2005).

Article

The United States Court of International Trade: How the Enforcement of Anti-Dumping and Countervailing Duties Impact U.S. Trade Relations with China

Allyson Poyker

In light of President Donald Trump's recent reelection, there has been prevalent discourse on his implementation of tariffs across a wide range of industries. In one of his responses to radically involving himself in regulating foreign commerce, President Trump emphasizes the importance of protecting our domestic industries through the use of these tariffs, as small and large businesses within the United States bolster the economy and provide job opportunities for many American citizens. Tariffs are just one component of the numerous foreign trade regulations that the United States has used to offset the highly competitive nature of internationally made products. To protect our domestic industries, there has been the implementation of anti-dumping laws and countervailing duties, otherwise known as trade remedy laws that support domestic manufacturers and respond to unfair trade practices by other countries.

One of the main countries that has been responsible for "dumping" inexpensive products into the U.S., resulting in an increase in competition for U.S. made products, has been China. China and the U.S. have had a long standing trade relationship as a result of China's low manufacturing costs. In light of the United States being the top export market for China, there are rising concerns regarding unfair trade practices such as alleged dumping and subsidization by Chinese companies, prompting the U.S. to implement stricter enforcement of anti-dumping and countervailing duty policies. The United States Court of International Trade plays a central role in interpreting and adjudicating these cases, ensuring compliance with trade regulations. This article provides an analysis of the U.S. Court of International Trade's interpretation of U.S. trade policy and application of trade remedy laws such as anti-dumping and countervailing duties, the extent of its impact on U.S. trade relations with China, and the growing need for initiative with the more rigorous application of trade remedy laws on behalf of the CIT.

[1] *The Contentious U.S.-China Trade Relationship*, Council on Foreign Relations, (Apr. 14, 2025), https://www.cfr.org/backgrounder/contentious-us-china-trade-relationship.

I. Introduction

Protectionist policies that serve to restrict international trade to help domestic industries[2] have been the cornerstone of economic nationalism, aiming to help encourage American-owned business growth and the country's job market. Part of these policies is the use of anti-dumping laws and countervailing duty policies to level the plainfield for U.S.-made products. But the enforcement of such protectionist policies has clear negative implications for countries that the U.S. predominantly imports products from, such as China.

In recent news, the American Active Anode Material Producers (AAAMP), an ad hoc trade association of domestic manufacturers, filed anti-dumping and countervailing duty petitions to "address alleged unfair imports of active anode material from China" on December 18th, 2024.[3] The AAAMP claimed dumping margins of "828 percent and 921 percent," indicating that the price at which active anode material from China is sold (based on U.S. prices) is significantly below "fair value," which is determined by the U.S. Department of Commerce. Active anode material includes those used in lithium-ion batteries for Battery Energy Storage Systems, electric vehicles, consumer electronics, medical equipment and other widespread applications.[4] Evidently, application of anti-dumping and countervailing duty petitions would place heavier duties or taxes on such products made in China, harming extensive amounts of Chinese exports of such batteries. However, before the official application of anti-dumping (AD) and countervailing (CVD) duties, the U.S. Department of Commerce (DOC) conducts a thorough investigation to determine whether dumping or subsidization is occurring, which involves calculating dumping margins or subsidy amounts. Meanwhile, the International Trade Commission (ITC) assesses whether the domestic industry—in this case, producers of active anode material—is being threatened with "injury" by these imports. The AAAMP also emphasizes its belief that the dumping of active anode material in the U.S. distorts the market and "prevents the establishment of an American industry."

As of now, there hasn't been an official initiation of the CVD and AD policies on the active anode material as the investigations conducted by both the ITC and The Department of Commerce have yet to be concluded. However, the high claimed dumping margins of "828 percent and 921 percent" indicate there is a substantial price difference in Chinese exports of active anode material and normal market values. This suggests strong grounds to assume the presence of dumping, swaying the DOC and ITC to likely vote in favor of initiating the antidumping and countervailing duties.

In likely response to the initiation of such duties, countless foreign producers located within China, such as BCC Electronics and BTR New Materials Group,[5] among others, may seek

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[2] Caleb Silver, *Protectionism: Examples and Types of Trade Protections*, Investopedia, (May 31, 2024), https://www.investopedia.com/terms/p/protectionism.asp.

[3] Ronald A. Oleynik, Andrew K. McAllister, Sophie Jin, Jingwen Xing, *New Antidumping and Countervailing Duty Investigations May Impact Imported Lithium-Ion Batteries*, Holland & Knight Alert (Jan. 14, 2025), https://www.hklaw.com/en/insights/publications/2025/01/new-antidumping-and-countervailing-duty-investigations

[4] Oleynik, McAllister, Jin, Xing, supra note 3

[5] *Anode Exporters & the China Tariff Loophole*, Harris Sliwoski LLP, https://harris-sliwoski.com/wp-content/uploads/AAnode-Exporters.pdf, (last visited Apr. 20, 2025)

the remanding of the ITC's and DOC's verdict by appealing this decision in the United States Court of International Trade. We have seen this specific course of action taken by other Chinese companies or manufacturers in reaction to the initiation of AD and CVD policies in other industries, such as in *GPX International Tire Corp. v. United States*, which involved a global tire provider company that worked with Chinese producers/exports of "off the road" tires for agricultural construction, materials handling and transportation.[6] The adjudication of *GPX International Tire Corp* in the U.S. Court of International trade had ended with the verdict that the U.S. Department of Commerce did not properly account for the potential for "double-counting of domestic subsidies"[7] when applying CVDs alongside anti-dumping duties to non-market economy countries such as China. However, this 2011 decision was later overturned by the U.S. Court of Appeals for the Federal Circuit, stating that the U.S. Department of Commerce has the ability to impose CVDs on goods "unfairly imported from a non-market economy."[8]

While the U.S. Court of International Trade's decision was eventually overturned, its decision-making resulted in harder pushback against U.S. trade policies on behalf of the Chinese government, arguing that the imposition of "double remedies" (anti-dumping duties and countervailing duties to "offset the effect of the government subsidies") went against the World Trade Organization's (WTO) Subsidies and Countervailing Measures Agreement.[9] China further retaliated by filing a formal complaint at the WTO. This point of contention brings about a larger conversation regarding the impact of the U.S. Court of International Trade's interpretation of Trade Remedy laws across a variety of cases involving Chinese companies and manufacturers, and its impact on the U.S.-China trade relations.

II. A Brief Overview of the U.S. Court of International Trade

The United States Court of International Trade (CIT) is responsible for adjudicating civil cases involving trade disputes between the United States and private entities such as importers, exporters and foreign governments. The CIT has nationwide jurisdiction over civil actions involving customs and international trade laws of the United States.[10] Most of the cases that the CIT adjudicates involve trade remedy laws such as anti-dumping and countervailing duties, as

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[6] *GPX International Tire Corp. to Sell Solid Tire Business*, AMN: aftermarketNews, (Nov 13, 2009), https://www.aftermarketnews.com/gpx-international-tire-corp-to-sell-solid-tire-business/

[7] Jennifer M. Smith-Veluz, Trading with the NME: The Legacy of Judge Restani's GPX Decisions, U.S. Ct. Int'l Trade, https://www.cit.uscourts.gov/sites/cit/files/Trading%20with%20the%20NME_The%20Legacy%20of%20Judge%20Restani%E2%80%99s%20GPX%20Decisions.pdf.

[8] Practical Law Commercial, *Federal Circuit Upholds Retroactive Countervailing Duties on Goods Imported from Nonmarket Economies*, Thomson Reuters Practical Law, (Mar. 18, 2015), https://content.next.westlaw.com/practical-law/document/I80ab61b9cdb411e498db8b09b4f043e0/Federal-Circuit-Upholds-Retroactive-Countervailing-Duties-on-Goods-Imported-from-Nonmarket-Economies

[9] *Agreement on Subsidies and Countervailing Measures ("SCM Agreement")*, Subsidies and Countervailing Measures: Overview, World Trade Organization, https://www.wto.org/english/tratop_e/scm_e/subs_e.htm, (last visited Apr. 21, 2025)

[10] U.S. Court of Int'l Trade, About the Court, https://www.cit.uscourts.gov/ (last visited Apr. 21, 2025).

well as tariffs. The court itself is made up of nine active judges that are appointed for life and who carefully adjudicate cases involving international trade law. Final decisions or verdicts derived from cases within the CIT can be appealed to the US Court of Appeals for the Federal Circuit.[11] In cases that involve AD or CVD policies, the plaintiffs usually undergo a process of investigation on behalf of the DOC and the ITC. The DOC is responsible for assessing whether or not dumping or subsidization has occurred and to what extent based on the calculation of the margins or subsidy amounts, while the ITC is responsible for evaluating the extent to which the domestic industry at hand is being threatened or "materially" injured with the imports in question.[12] After the investigation has occurred, the DOC and the ITC come to a consensus, determining the need for the enforcement of AD and CVD policies. If these protectionist policies are to be enforced, the plaintiff may attempt to have their case remanded by the CIT.

III. Defining Anti-Dumping And Countervailing Duties

Anti-dumping and countervailing duties are trade remedy laws used to protect our country's domestic industries. Dumping occurs when a foreign manufacturer or exporter sells a product within the United States for a price that is significantly below what is considered "fair market price"[13] which is determined by the Department of Commerce. ADs are protectionist tariffs that the U.S. or any domestic government may impose on foreign imports if their prices are believed to be priced significantly below fair market value. The ITC is an independent government agency that is directly responsible for imposing anti-dumping duties.[14] CVDs are tariffs imposed on imported goods to offset subsidies offered to producers of a certain product by the exporting country's government.[15] In this situation, subsidies are the offering of benefits to businesses by the government. Essentially, CVDs are trade policy measures used to balance out the extensive advantages that are present when a government provides subsidies to certain industries and their producers. Without the presence of CVDs, domestic industries within the U.S. that produce a certain good for a fair market price may be at an extensive disadvantage due to highly subsidized foreign imports, allowing foreign producers to sell their products for significantly less money. The use of anti-dumping and countervailing duties simultaneously occurs to address unfair pricing and government subsidized advantages on foreign imported goods.

IV. Non-Market Economy Status: How it Impacts the Application of Anti-Dumping and Countervailing Duties

[11] US Court of International Trade (CIT), Thomson Reuters Practical Law, https://uk.practicallaw.thomsonreuters.com/w-020-5975?transitionType=Default&contextData=(sc.Default)&firstPage=true (last visited Apr. 21, 2025)

[12] Oleynik, McAllister, Jin, Xing, supra note 3

[13] U.S. Customs and Burder Protection, *Anti Dumping and Countervailing Duties (AD/CVD) Frequently Asked Questions*, https://www.cbp.gov/trade/priority-issues/adcvd/antidumping-and-countervailing-duties-adcvd-frequently-asked-question, (last visited Apr. 21 2025)

[14] Will Kenton, *Anti-Dumping Duty: What It Is, How It Works, Examples, Investopedia*, (Oct. 06, 2020), https://www.investopedia.com/terms/a/anti-dumping-duty.asp

[15] Will Kenton, *Understanding Countervailing Duties (CVDs) in Global Trade*, Investopedia (Oct. 20, 2021), https://www.investopedia.com/terms/c/countervailingduties.asp

Furthermore, the imposition of duties is also dependent on a nation's economic classification. China is classified as a non-market economy (NME) by the United States. This classification was first applied in the Omnibus Foreign Trade and Competitiveness Act of 1988.[16] As a result of this act, the DOC was given the authority to classify China as an NME because the DOC determined that China "does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of merchandise."[17] In consequence of China being classified as an NME, it is subject to much higher trade penalties on its exports to the U.S.

V. Significant Cases Involving the United States and Chinese Companies

a. GPX International Tire Corp. v. The United States

GPX International Tire Corp. v. The United States was a significant U.S. trade law case that dealt with the application of CVDs to imported goods from NME countries. GPX International Tire Corp is a third-generation family owned business that is also one of the largest independent global providers of specialty tires that are used in industries such as agricultural, construction and materials handling and transportation.[18] GPX International had been a part of a definitive sale agreement for its Solid Tire business with manufacturing facilities in Hebei, China. To understand the novelty of this specific trade law case in relation to the application of CVDs to an NME country, we must look at the actions of the ITC occurring prior to the case.

In 2007, the ITC initiated seven new countervailing duty investigations[19] on several countries responsible for producing coated freesheet paper, one of which was China. The significance of this case is attributed to the fact that prior to 2007, CVDs had been considered inapplicable for NMEs such as China. For countries that are considered market economies, the DOC is responsible for calculating the "normal price or value" of the foreign good being imported using "prices or costs in the exporter's home market."[20] If the foreign company's export price is lower than normal compared to fair market price in the U.S., ADs would be applied. On the other hand, if a country is considered an NME, Commerce applies a different methodology to establish the normal value (or fair market price). For over twenty years, Commerce had refused to apply U.S. CVD law to NMEs[21] because the "centrally planned nature of the economies made

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[16] Christopher Blake McDaniel, *SAILING THE SEAS OF PROTECTIONISM: THE SIMULTANEOUS APPLICATION OF ANTIDUMPING AND COUNTERVAILING DUTIES TO NON MARKET ECONOMIES-AN AFFRONT TO DOMESTIC AND INTERNATIONAL LAWS*, 38 Georgia J.I.C.L. 741, 751-53 (2010) (discussing Omnibus Foreign Trade and Competitiveness Act of 1988)

[17] Christopher Blake McDaniel, supra note 16

[18] *GPX International Tire Corp. to Sell Solid Tire Business*, AMN: aftermarketNews supra note 6

[19] U.S. International Trade Com., Pub. 4026, The Year in Trade 2007: Operation of the Trade Agreements Program 59th Report (2008).

[20] LAW 360, Mayerbrown, The Importance Of GPX International Tire V. US, https://www.mayerbrown.com/-/media/files/news/2010/08/the-importance-of-gpx-international-tire-v-us/files/mayerbrowngpxinternationaltirepdf/fileattachment/mayerbrown-gpxinternationaltire.pdf

[21] LAW 360, Mayerbrown, supra note 20

This refusal to apply CVDs to NMEs would change in 2007, when the DOC determined that while China was still an NME, "sufficient economic reforms" occurred, allowing Commerce to determine an accurate number representing the financial contribution and benefit of subsidies by the Chinese government to its industries.[22] As a result, Commerce would begin applying CVD law to imports from China alongside AD policies. This was seen in the application of CVD and AD law to the coated freesheet paper imports from China.

GPX International Tire Corp had occurred directly after the new implementation of CVD law on Chinese imports. Using NME methodologies, the DOC "calculated an AD margin of 29.93% for Starbright, 8.44% for TUTRIC, and 5.25% for Guizhou,"[23] the Chinese tire manufacturers for GPX International. In response, in September2008, GPX had filed three complaints in the CIT contesting the AD and CVDs. During the adjudication of the CIT, Judge Restani, who was overseeing the case, acknowledged that prior to 2007, Commerce did not apply CVD law to NME countries, but due to China undergoing economic reforms allowing it to "[advance] beyond the Soviet-style command economy,"[24] would result in accurate determination of the specific financial contribution of the government to producers in China, authorizing the application of CVD duties as well as AD duties. However, Judge Restani decided against this application in her adjudication of the case, determining that Commerce's application of both AD and CVD cases against Chinese products would double-count the alleged subsidies.[25] GPX International initially made this claim stating that the double counting of duties "punishes Chinese companies twice for the same allegedly 'unfair' trading practice."[26] The CIT further stated that Commerce must forgo the application of countervailing duty law on NME products because Commerce has "demonstrated its inability"[27] to use improved methodologies to remedy or prevent the presence of double counting when calculating anti-dumping remedies and countervailing remedies for each good.

Following this decision, the DOC appealed the CIT's verdict in the Court of Appeals for the Federal Circuit. This appeal resulted in the Court of Appeals for the Federal Circuit (CAFC) issuing a decision in March 2015,[28] for the allowance of imposition of countervailing duties on NME countries. The CAFC had made this issuance utilizing Public Law No. 112-99 which had been enacted by Congress in February 2012 following the CIT's verdict. Public Law No. 112-99[29] authorizes the application of CVDs to imports from NME countries.

While the CIT's verdict regarding *GPX International Corp.* was overturned, the acknowledgement of the unfair nature of double counting had constituted grounds for

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[22] LAW 360, Mayerbrown, supra note 20

[23] GPX Int'l Tire Corp. v. United States, No. 08-00285, SLIP OP. 09-103 (Ct. Int'l Trade, Nov 12, 2009)

[24] GPX Int'l Tire Corp. v. United States, supra note 23

[25] GPX Int'l Tire Corp. v. United States, supra note 23

[26] GPX Int'l Tire Corp. v. United States, supra note 23

[27] GPX Int'l Tire Corp. v. United States, supra note 23

[28] Alan Baty, Court of Appeals for the Federal Circuit Upholds Non-Market Economy Countervailing Duties, Frohsin Barger Walthall & Bucy (Mar. 16, 2015), https://frohsinbarger.com/antidumping-blog/court-of-appeals-for-the-federal-circuit-upholds-non-market-economy-countervailing-duties

[29] Act of Mar. 13, 2012, Pub. L. No. 112–99, 126 Stat. 265.

disagreement and outrage on behalf of the Chinese government. China had then taken its complaints to the WTO, the only international organization responsible for dealing with rules of trade between nations.[30] In light of the CIT's verdict and then the enactment of Public Law No. 112-99, China claimed that the WTO panel failed to investigate and avoid double remedies in 26 countervailing duty investigations,[31] further stating that the imposition of countervailing duties is consistent with "articles 10, 19 and 32 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement)."[32] After further evaluation, the WTO panel and its members determined that China failed to demonstrate that the imposition of duties as a measure "fell within the description of its claim,"[33] which initially was that the use of double remedies went against the SCM Agreements. Despite this consensus, China was still outraged, stating that this was an "absurd result" of the Panel's interpretation of Article X:2 (referring to Article II, Section 2 of the U.S. Constitution,[34] outlining the powers of the president, including their ability to make treaties with the advice and consent of the Senate). China continued to argue against the final decision of allowing double remedies by using Article X:2 and the CIT's verdict, but was not able to sway either the WTO or the U.S. to decide in its favor.

While the CIT's decision was not considered a final resolution to the legal dispute regarding the GPX International Case, its decision acted as a continuation of the larger discussion involving the U.S.'s interpretation of its trade laws and China's differing opinion on how the U.S. is allowed to interpret and reimagine its CVD application to non-market economy countries. While China had not made any immediate direct changes to its trading practices with the U.S. as a result of this case, China's discussion in the WTO panel proceedings, stating that the U.S. was acting inconsistently with its trade remedy laws with the application of double remedies, had escalated U.S.-China trade tensions through reform debate at the WTO.

b. Changzhou Trina Solar Energy Co. v. The United States

The U.S.'s aggressive application of AD and CVDs to Chinese companies has evidently occurred because of China's large manufacturing capacity in many important and competitive industries. Besides being the world's largest tire manufacturer, China is also the largest manufacturer of solar panels, controlling over 80 percent of the global solar panel supply chain.[35] Changzhou Trina Solar Energy Co. is one of several Chinese companies that comprise a significant portion of China's solar energy industry. Changzhou Trina Solar Energy Co. is a subsidiary of Trina Solar, a Chinese company specializing in manufacturing photovoltaic products, such as PV systems that consist of power stations, system products,[36] and photovoltaic

[30] World Trade Organization, What is the WTO?, https://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm (last visited Apr. 21, 2020)

[31] Appellate Body Report, UNITED STATES – COUNTERVAILING AND ANTI-DUMPING MEASURES ON CERTAIN PRODUCTS FROM CHINA, 12, WTO Doc. WT/DS449/AB/R, (adopted Jul. 7, 2014)

[32] Appellate Body Report, supra note 31

[33] Appellate Body Report, supra note 31

[34] U.S. Const. art. II, § 2.

[35] China Dominates Solar. Does the U.S. Stand a Chance?, Wall Street Journal (July 24, 2023), https://www.wsj.com/video/series/u.s.-vs.-china/china-dominates-solar-does-the-us-stand-a-chance/36C897CD-0391-4CD6-A2F4-AAB54C8FB90E

[36] Trinasolar Co., Our Company, https://www.trinasolar.com/en-glb/our-company (last visited, Apr. 21, 2025)

modules, otherwise known as solar panels. Due to China's domination of the solar panel industry, American manufacturers felt threatened by the price at which Chinese solar panel companies sold their product for, later resulting in *Changzhou Trina Solar Energy Co. v. United States*. This case involved Changzhou Trina Solar Energy which contested the imposition of anti-dumping and countervailing duties by the Department of Commerce in the United States Court of International Trade.

In December 2013, SolarWorld, a leading American manufacturer of solar panels, filed anti-dumping and countervailing duty petitions involving imports of "certain crystalline silicon photovoltaic products[37] (otherwise known as solar panels)" from China. The DOC and ITC were responsible for investigating the validity of such claims through anti-dumping and countervailing duty investigations. Similarly to the calculation of anti-dumping margins for *GPX International Tire Corp*, the calculation of anti-dumping margins for *Changzhou Trina Solar Energy* involved extensive legal and methodological complexities. A dumping margin is used to indicate the amount by which "the normal value or the price a producer charges in a home market, exceeds the 'export price', the price at which the product is valued at in the United States."[38] As a result of the Tariff Act of 1930,[39] Commerce must calculate an individual weighted-average dumping margin for each known exporter and producer of the subject merchandise, but section 777a(c)(2) of the Act allows Commerce to limit its examination to a "reasonable number of exporters and producers,"[40] because of the sheer size of the solar panel industry in China. Therefore, the administrative review involving the initial anti-dumping investigation had covered fifty-three companies responsible for exporting the subject merchandise, however it was necessary to narrow down the investigation to sixteen companies responsible[41] for producing photovoltaic products, with Trina Solar Energy and Risen Energy Co., as mandatory respondents due to the sheer size of the two companies and evident volume data.

It was also established during a discussion of methodology that China would be referred to as an NME country. This application of NME terminology would require that Commerce would maintain a presumption that all companies within China are subject to government control, and therefore should be assigned a single AD rate.[42] Accordingly, when Commerce investigates imports from an NME country, section based on 773(c)(1) of the Tariff Act of

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[37] CHANGZHOU TRINA SOLAR ENERGY CO., LTD., TRINA SOLAR (CHANGZHOU) SCIENCE & TECHNOLOGY CO., LTD., v. United States v. SOLARWORLD AMERICAS INC., No. 20-1004, slip op. at pg. 2 (Fed. Circ. Sept. 3, 2020), https://www.cafc.uscourts.gov/opinions-orders/20-1004.opinion.9-3-2020_1647270.pdf

[38] CHANGZHOU TRINA SOLAR ENERGY CO LTD v. (2020) United States Court of Appeals, Federal Circuit. CHANGZHOU TRINA SOLAR ENERGY CO., LTD., Trina Solar (Changzhou) Science & Technology Co., Ltd., Trina Solar (U.S.) Inc., Plaintiffs-Appellees v. UNITED STATES, Defendant-Appellee v. SolarWorld Americas, Inc., Defendant-Appellant, FindLaw, (Sept. 3, 2020), https://caselaw.findlaw.com/court/us-federal-circuit/2084671.html

[39] Smoot-Hawley Tariff Act, 1 U.S.C. §§ 116-113 (1930), https://www.govinfo.gov/content/pkg/COMPS-8183/pdf/COMPS-8183.pdf

[40] Decision Memorandum for the Preliminary Results of the 2017- 2018 Antidumping Duty Administrative Review of Crystalline Silicon Photovoltaic Cells, Whether or not Assembled into Modules, From the People's Republic of China, A-570-979 (Dept. of Commerce Jan. 31, 2020) (Public Document) https://access.trade.gov/Resources/frn/summary/prc/2020-02563-1.pdf

[41] Decision Memorandum, supra note 40

[42] Decision Memorandum, supra note 40

1930,[43] Commerce has to compare Normal Value (fair price for goods in a surrogate market) with Export Price (price charged when exporting goods to the U.S.). Commerce is required to use Normal Value taken from a surrogate market rather than from China's Market because, for NMEs, Commerce cannot use domestic prices because they are subject to and distorted by state control.[44] In this case, Commerce used Thailand's input price to determine the normal value for solar panels, Commerce then goes on to compare this Normal Value to that of Trina Solar Energy's export prices, an important factor of the dumping margin determination discussed in the next paragraph.

Prior to calculating Trina Solar Energy's anti-dumping margins and countervailing duty rate, there was debate on the matter of the scope of the order. During preliminary investigations, the Chinese Chamber of Commerce for Import and Export of Machinery and Electronic Products (an association of Chinese producers and exporters, as well as related U.S. importers of subject merchandise) opposed the initial petition, demanding that the ITC develop a more broad definition of Crystalline Silicon Photovoltaic Cells and Modules (CSPV). The Chinese Chamber of Commerce argued that "the scope should include thin-film photovoltaic products, in the definition of the domestic like product,"[45] as doing so would broaden the definition of CSPV products and potentially dilute the injury margin (determined based on extent of material injury on domestic producers). If this definition were to include thin-film products, the injury margin would be spread across more products and companies, therefore weakening the case for imposing duties. Despite these requests, the ITC excluded thin-film products (CSPV, not exceeding 10,000mm^2 in surface area) from the scope of the domestic product.[46]

In December 2014, while calculating Trina Solar Energy's countervailing duty rate which is used to determine presence of government subsidies, Commerce recognized that several programs run by the Chinese government were responsible for allocating subsidies to Trina Solar Energy, with the most controversial one being called Export Buyer's Credits, provided by the Export-Import Bank of China (Ex-Im Bank).[47] The Ex-Im Bank provides loans directly to foreign importers at below-market interest rates, coupled with long repayment periods and grace periods before repayment starts, otherwise known as the Export-Import Buyer's Credits Program.[48] It is also important to note that this program lacks transparency, as it's often difficult

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[43] Decision Memorandum, supra note 40

[44] Decision Memorandum, supra note 40

[45] CHANGZHOU TRINA SOLAR : ENERGY CO., LTD., TRINA SOLAR : (U.S.) INC., WUXI SUNTECH POWER : CO., LTD., SUNTECH AMERICA, INC., : SUNTECH ARIZONA, INC., YINGLI : GREEN ENERGY HOLDING COMPANY : LIMITED, and YINGLI GREEN : ENERGY AMERICAS, INC. v. UNITED STATES INTERNATIONAL TRADE COMMISSION and SOLARWORLD AMERICAS INC., No. 13-00014, SLIP OP. 15-84 (Ct. Int'l Trade, Aug. 7, 2015)

[46] Decision Memorandum, supra note 40

[47] CHANGZHOU TRINA SOLAR ENERGY CO LTD v. (2020) United States Court of Appeals, Federal Circuit. CHANGZHOU TRINA SOLAR ENERGY CO., LTD., Trina Solar (Changzhou) Science & Technology Co., Ltd., Trina Solar (U.S.) Inc., Plaintiffs-Appellees v. UNITED STATES, Defendant-Appellee v. SolarWorld Americas, Inc., Defendant-Appellant, supra note 38

[48] Directorate-Gen. for External Policies, Eur. Parl., Policy Department DG External Policies, Briefing Paper, Export Finance Activities by The Chinese Government, EXPO/B/INTA/FWC/2009-01/Lot7/15 (2011),

to verify the usage of such credits by foreign buyers, because the details of loans are private between the buyer and the E-ImBank, making it harder for Commerce to properly investigate and enforce accurate countervailing duties on companies involved with Ex-Im Bank. Commerce further stated that, "where we have found that such export buyer's credits have been used by buyers, we have consistently found such financing to be countervailable (subject to countervailing duties), as a subsidy benefitting the exporter."[49] When Trina Solar Energy was questioned about its involvement with the Ex-Im Bank Buyer's Credit Program, it denied any involvement. However, Commerce was unable to verify Trina's reported non-use. Commerce was then forced to rely on "adverse facts available (AFA)," which is a legal tool used by the U.S. Department of Commerce during trade investigations under 19 U.S.C. §§ 1677e(a) and (b),[50] often implemented when a party–like Trina Solar Energy–withholds complete or verifiable information, allowing Commerce to assume the worst reasonable scenario instead of just assuming there is no information available. The assumption of the worst reasonable scenario according to adverse facts available within this case has allowed Commerce to assume that Trina did benefit from the Ex-Im Bank Buyer's Credit program, at a rate of "10.54 percent ad valorem, the highest rate determined for a similar program in a prior PRC (People's Republic of China) proceeding" (Final CVD I&D Mem. 16).[51]

In July 2017, Commerce calculated a 9.61 percent weighted average dumping margin for Trina Solar Energy, but declined to offset Trina's export price by a countervailed export subsidy.[52] This was due to the fact that Commerce applied AFA for the Export Buyer's Credit Program but recognized that they had no verifiable information to base the countervailing export subsidies off of.

In response to the DOC's calculations and ITC's injury determination, both SolarWorld Americas Inc. and Trina Solar Energy filed suits against the government in the CIT. In August 2015, during an earlier round of litigation evaluated before Judge Richard K. Eaton (prior to the final calculation of the AD margin), the CIT fully upheld the ITC's material injury determination but remanded aspects of the DOC's determinations. While the CIT fully agreed with Trina's Solar Energy's material injury to the U.S. domestic market for solar panels, in May 2020, in response to the fourth administrative review of CSPV cells, Judge Claire R. Kelly adjudicated the case, determining that Commerce's use of AFA and then refusal to offset Trina's export price

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https://www.europarl.europa.eu/RegData/etudes/note/join/2011/433862/EXPO-INTA_NT(2011)433862_EN.pdf

[49] CHANGZHOU TRINA SOLAR ENERGY CO LTD v. (2020) United States Court of Appeals, Federal Circuit. CHANGZHOU TRINA SOLAR ENERGY CO., LTD., Trina Solar (Changzhou) Science & Technology Co., Ltd., Trina Solar (U.S.) Inc., Plaintiffs-Appellees v. UNITED STATES, Defendant-Appellee v. SolarWorld Americas, Inc., Defendant-Appellant, supra note 38

[50] Determinations On Basis of Facts Available, 19 U.S.C. § 1677e (2018)

[51] Determinations On Basis of Facts Available, 19 U.S.C. § 1677e (2018), https://www.law.cornell.edu/uscode/text/19/1677e

[52] CHANGZHOU TRINA SOLAR ENERGY CO LTD v. (2020) United States Court of Appeals, Federal Circuit. CHANGZHOU TRINA SOLAR ENERGY CO., LTD., Trina Solar (Changzhou) Science & Technology Co., Ltd., Trina Solar (U.S.) Inc., Plaintiffs-Appellees v. UNITED STATES, Defendant-Appellee v. SolarWorld Americas, Inc., Defendant-Appellant, supra note 38

by a countervailed export subsidy was deemed "contrary to law."[53] This was attributed to the fact that the use of AFA does not require Commerce to find affirmative fact or evidence of Trina Solar Energy having used the Ex-Im Bank Buyer's Credit Program, and that all elements of the statute had been satisfied by the withholding of information on behalf of Trina. The CIT directed Commerce to recalculate Trina's export prices to account for the offset.[54]

The timeline and evaluation of *Changzhou Trina Solar Energy Corp. v. United States* within the CIT is very meticulous and complex, as Judge Kelly gives her initial opinion in May 2020, her first remand review in April 2021, and second remand review for the final CIT decision in March 2022. There is also need for clarification, as *SolarWorld v. United States* was also an ongoing case within the CIT, adjudicated by Judge Restani, in which SolarWorld demanded the enforcement of offsetting Trina Solar Energy's export price by a countervailed export subsidy.

Throughout Judges Eaton and Kelly's adjudication of the case, Judge Eaton has sustained his disagreement with Commerce's decision to not offset Trina's export price by a countervailing export subsidy, and Judge Kelly disagreed with Commerce's selection of surrogate values for CSPV goods. Commerce states that they reasonably determined that Thai import data under HTS 7007.19.90000 (referring to glass sheets used in solar panels) is based on the best available information regarding the values of relevant factors in a market economy country or countries.[55] Commerce specifically picked Thailand as the surrogate country, because it's economically comparable to that of China's market economy and produces similar solar products. During the first review in 2020, Judge Kelly sustained the use of Thailand as a surrogate country, but later became more critical of Commerce's reliance on specific Thai data inputs in following reviews of the Commerce's decisions before the CIT. Judge Kelly questioned Commerce's justification for using Mexican import data for nitrogen input instead of utilizing data from Thailand, which had been the primary surrogate country, thereby emphasizing inconsistency in Commerce's surrogate data selection.[56] The CIT also evaluated the Commerce's use of surrogate values from other market economies for the valuation of freight/shipping costs (as part of estimating the normal value of the Chinese products) to calculate AD margins. Commerce had initially used Maersk Line Data to value Trina's ocean freight expenses however the CIT later overturned this

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[53] CHANGZHOU TRINA SOLAR ENERGY CO LTD v. (2020) United States Court of Appeals, Federal Circuit. CHANGZHOU TRINA SOLAR ENERGY CO., LTD., Trina Solar (Changzhou) Science & Technology Co., Ltd., Trina Solar (U.S.) Inc., Plaintiffs-Appellees v. UNITED STATES, Defendant-Appellee v. SolarWorld Americas, Inc., Defendant-Appellant, supra note 38

[54] CHANGZHOU TRINA SOLAR ENERGY CO LTD v. (2020) United States Court of Appeals, Federal Circuit. CHANGZHOU TRINA SOLAR ENERGY CO., LTD., Trina Solar (Changzhou) Science & Technology Co., Ltd., Trina Solar (U.S.) Inc., Plaintiffs-Appellees v. UNITED STATES, Defendant-Appellee v. SolarWorld Americas, Inc., Defendant-Appellant, supra note 38

[55] CHANGZHOU TRINA SOLAR ENERGY CO LTD v. (2020) United States Court of Appeals, Federal Circuit. CHANGZHOU TRINA SOLAR ENERGY CO., LTD., Trina Solar (Changzhou) Science & Technology Co., Ltd., Trina Solar (U.S.) Inc., Plaintiffs-Appellees v. UNITED STATES, Defendant-Appellee v. SolarWorld Americas, Inc., Defendant-Appellant, supra note 38

[56] Changzhou Trina Solar Energy Co. v. United States, No. 18-00176, SLIP OP. 20-64 (Ct. Int'l Trade, May 13, 2020)

decision, stating the the usage of Xenata data allows for more specificity and does not exclude handling charges (unlike Maersk data).[57]

As of this writing most recently, March 31, 2024, the CIT's recurring requests for Commerce's remand of its decisions, have been successful, with Commerce's original administrative review results being opposed. Commerce was forced to offset Trina's export by a countervailing export subsidy, with an established 9.02% ad valorem as a result. Commerce is also now relying on Xeneta data to account for any "missing ocean freight surcharges," continuing to use Thailand as a main surrogate country (for the normal value calculations), while using Mexico for its import data.

Due to the extensiveness of this case, with its most recent decision taking place just last year, the long term impacts of the CIT's decision are yet to to be concretely known. In 2020, The U.S. Court of Appeals for the Federal Circuit affirmed the judgment of the CIT, agreeing with CIT's decision to offset Trina Solar Energy's export price by the amount of countervailing duty imposed to neutralize the export subsidy from China's Ex-Im Bank Buyer's Credit Program. Therefore, the U.S. Court of Appeals for the Federal Circuit is unlikely to reverse its decision. Throughout the case, it was evident that Trina Solar Energy withheld information in order to minimize the tariffs imposed. The CIT and its judges have proven to be incredibly meticulous when adjudicating cases and were intolerant of such vagueness of information, which initially was the reason why Commerce refused to impose additional tariffs. The CIT's enforcement of higher tariffs also strengthened the U.S.'s trade defense system against Chinese solar energy products, which are highly competitive due to their low prices, resulting from high government subsidies. This case had also reinforced existing precedent involving AFA, proving that absence of information can inflict extensive consequences on parties that withhold information. Prior to the final determination of the case by CIT, in 2019, China had filed complaints against the U.S. to the WTO, regarding countervailing duty measures on certain products, such as solar panels. China claimed that according to Article 32.1 of the SCM Agreement[58] (entailing that WTO members such as the U.S. cannot implement unfair subsidies), the U.S. has acted inconsistently with line pipe, pressure pipe, and solar panels Section 129 proceedings.[59] The U.S.'s crackdown on tariffs applied to China's solar panel exports are also indicative of the U.S. trying to offset the extensive dominance of China in the solar panel manufacturing industry. With the U.S. currently prioritizing building up its domestic supply chain and manufacturing,[60] it was quite clear that the CIT's enforcement of higher tariff rates against China solar panel companies had been on par with the U.S. solar panel initiative. But the U.S.'s dependence on China's solar panel manufacturers will persist due to China's overwhelming advantage in this specific industry, regardless of our efforts to expand our own solar industry.

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[57] CHANGZHOU TRINA SOLAR ENERGY CO., LTD. ET AL. and JA SOLAR TECHNOLOGY YANGZHOU CO., LTD. ET AL. v. UNITED STATES and SOLARWORLD AMERICAS, INC. ET AL., No. 18-00176, SLIP OP. 21-98 (Ct. Int'l Trade, Aug. 10, 2021)

[58] Appellate Body Report, UNITED STATES – COUNTERVAILING DUTY MEASURES ON CERTAIN PRODUCTS FROM CHINA, 10, WTO Doc. WT/DS437/AB/RW, (adopted Jul. 16, 2019)

[59] Appellate Body Report, UNITED STATES – COUNTERVAILING DUTY MEASURES ON CERTAIN PRODUCTS FROM CHINA, 9, WTO Doc. WT/DS437/AB/RW, (adopted Jul. 16, 2019)

[60] China Dominates Solar. Does the U.S. Stand a Chance?, Wall Street Journal, supra note 35

With the U.S.'s clear push for stricter enforcement of trade remedy laws, China has started to get more creative with how it circumvents such steep tariffs. Dominant Chinese Solar Energy Manufacturers like Longi Green Energy Technology and Trina Solar, have diversified the location of their manufacturing facilities in countries such as Indonesia and Laos[61] in order to bypass tariffs specifically aimed at China, now further complicating grounds for tariff enforcement as final location of production of solar panel components is now often located outside of China. China has evidently improved its methods in attempting to avoid or offset the effect of mounting U.S. tariffs by diversifying production locations and with programs such as the Export Buyer's Credits.

VI. Conclusion

GPX International Tire Corp and *Changzhou Trina Solar Energy* are only a small fraction of the numerous cases that the CIT has had jurisdiction over, influencing significant decision-making in altering or strengthening trade remedy laws. China's growing economy and significant spending on specific industries as part of their industrial policy is a clear cause for concern for the U.S. government, prompting aggressive initiation of anti-dumping and countervailing duties.

The extensiveness of the process of application of anti-dumping and countervailing duties against foreign companies indicates the thorough and unbiased review of the ITC, DOC, and especially the CIT. While the CIT's verdict may be appealed by the U.S. Court of Appeals for the Federal Circuit or overruled by the U.S. Supreme Court, the CIT's impact on the enforcement of trade remedy laws is undeniable. Essentially, the CIT advances the legal and policy discourse surrounding the enforcement of double remedies, as indicated by *GPX International Tire Corp.*, as well as the question of validity of the use of AFA through C*hangzhou Trina Solar Energy Co. v. United States.* In response to the remand determinations of the CIT regarding the application of CVDs and ADs by the DOC and ITC, Chinese companies as well as the Chinese government have stronger grounds for argument against the U.S's initiation of such trade remedies, more so emphasizing China's line of reasoning that the U.S.'s trade remedy laws are not consistently adhering to WTO regulations as well as the U.S.'s own pre-established trade remedy law policy, such as the previous strict non-implementation of CVDs on NME countries, because of the difficulty in calculating the exact subsidy contributions to companies in question. The CIT's determinations in numerous cases involving Chinese companies act as one of the main contributors to causing tensions between China and the U.S. in the WTO.

While President Trump's initiation of tariffs against China has been quite recent, the long-term implications of the increase in filing of petitions to initiate CVDs and ADs by domestic industries is quite apparent, and likely paints a future of stricter and more frequent implementation of trade remedy laws against foreign industries, presenting the CIT with many more cases to adjudicate, and to thereby leave lasting verdicts that will continue to impact U.S. trade relations with China.

The United States Court of International Trade's decisions consistently demonstrate authenticity of judgement, with its judges adjudicating various trade remedy law cases and

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[61] Lewis Jackson, Phuong Nguyen, Colleen Howe, and Nichola Groom, Chinese solar firms go where US tariffs don't reach (Nov. 4, 2024, 8:03 PM), https://www.reuters.com/business/energy/chinese-solar-firms-ever-nimble-go-further-afield-where-us-tariffs-dont-reach-2024-11-03/

remanding such cases due to vagueness of information, or incorrect use of precedent despite the differing determinations of the ITC and DOC. In light of the recent discussion of Donald Trump's varying tariff implementations, the United States Court of International Trade needs to apply its unwavering authentic judgement and care to detail when determining the constitutionality of such tariffs. The rigorous approach of the ITC and DOC when investigating the validity of petitions against foreign Chinese companies should influence the level of judicial analysis of the CIT when reviewing administrative determinations. It is quite clear that Chinese companies have developed newer, more advanced methods to attempt to avoid U.S. tariffs, prompting the need for the CIT to be more critical than ever, when adjudicating cases involving the application of trade remedy laws.

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